The Central Law Journal.

ST. LOUIS, DECEMBER 11, 1885.

CURRENT EVENTS.

JUDGE CARDOZA.—Ex-judge Cardoza died in New York on November 8th of Bright's Disease. He was notorious for his complicity with Boss Tweed's ring, and was successfully impeached and removed from office.

EFFECT OF THE NEW "REPORTERS."—The *Daily Register* (New York), edited by that eminent legal scholar and author, Austin Abbott, echoes the views which have been expressed in the *Albany Law Journal*, and also this journal, concerning the effect on legal journalism of the "Reporters" which are springing up all over the country, in the following language: "The well edited law journals, such as the *Albany* and the CENTRAL and others of more local circulation, which owe their success and their hold upon their readers to the ability with which they present within their respective jurisdictions fresh and original views of questions of present interest to the profession, quite as much as to the condensed notes of current decision, have, we believe, nothing to fear from the new methods of reporting which are now inaugurated. If we mistake not, these new methods of 'Reporters,' giving early publication to the decisions in groups of States, are but following up the work which the journals are carrying on, of leading the profession to a broader and freer comprehension and interpretation of the law; and, so far from superseding the usefulness of such journals, they appear to us to add to the necessity which the profession will feel, and the obligation they are under both to the condensed notes of cases too long to be read in full, and to the editorial comment and discussion which afford an invaluable aid to the discriminating reader of the reports."

AN UNIFORM BANKRUPTCY LAW.—The *Cincinnati Law Bulletin* publishes a plea for uniform laws on the subject of bankruptcy throughout the United States, and for the uniform administration of the same by such inferior courts of bankruptcy as Congress may from time to time establish, by James H. Thompson of Hillsboro, Ohio, addressed to Hon. John W. Stevenson, of Covington, Ky., as pre ident of the American Bar Association, and to the Hon. Asa W. Jones, of Youngstown, Ohio, as President of the Ohio Bar Association. No doubt Gen. Stevenson will read the paper with interest, although he is not now president of the American Bar Association, but William Allen Butler, of New York, is. But it is futile to address such a paper to the president of the American Bar Association with the expectation of getting a practical response in the form of a recommendation to that body; because the cor stitution of that body prescribes the subject of the president's annual address, which is a *resume* of the legislation of the country during the preceding year. The way of stirring such a question in the American Bar Association is to introduce a resolution in that body, get it referred to the committee on Jurisprudence and Law Reform, and reported on at the next meeting, when the whole subject will come up for discussion.

SUPPRESSING THE UNOFFICIAL PUBLICATION OF COURT OPINIONS.—We find the following inthe *Daily Law Record* (Boston), one of the most useful of our legal exchanges: "The petition of the *Daily Law Record* v. John Lathrop, reporter of the decisions, for a writ of *mandamus* to compel him to allow this paper to publish in full the current opinion of the Supreme Court, was heard before Justice Devens in the equity session of the Supreme Judicial Court yesterday, the judge reserving the case for the consideration of the full court. R. R. Bishop and Augustus Russ appeared for the plaintiff, Russell and Putnam representing the defendant. As is well known, the real defendant in this suit is the firm of Little, Brown & Co., which claims that under its contract with the State,—which provides that the reporter sha'l not publish, or furnish for publication, the opinions of the Supreme Judicial Court,—the defendants have the exclusive right to publish the opinions. The plaintiff's counsel claimed that the

opinions were public records, and that every one was entitled to know the law of the land, and that there could be no copyright in the opinions, and that this attached only to the reporter's preparation of the case. The defendants relied wholly on their special contract with the Legislature, and claimed that the general publication of the opinions injured the sale of the regular reports. For the present, there is an embargo against abstracts. A similar question has arisen in other States, and its decision here will be of special interest to the bar and the courts."

We had always supposed that the copyright laws were for the protection of *authors*, and that judicial opinions, which are required by law to be written and filed as public records, are no more entitled to protection as literary property, than any other official document would be. We have, therefore, regarded the attempts of the States in their corporate character to cover, these opinions, by copyrighting their state reports, as wholly farcical and nugatory. Moreover, we had supposed that a sound public policy would encourage, rather than discourage, the private publication of judicial opinions, which are the evidences of the law by which men must regulate their conduct. We had supposed that Massachusetts, in some respects the most enlightened State of the Union, would be the last State in which an attempt to suppress the publication of the laws—for that is exactly what it amounts to—would be made. The very idea recalls the example of Caligula. From a moral point of view, it is monstrous; from a legal point of view, it seems as absurd as to attempt to suppress the unofficial publication of the Acts of the Legislature.

NOTES OF RECENT DECISIONS.

ASSIGNMENT FOR CREDITORS—POWER OF ASSIGNEE TO AVOID PREVIOUS CONVEYANCES OF ASSIGNOR.—In the recent case of *Clapp v. Nordmeyer*,[1] in the United States Circuit Court at St. Louis, Mr. Circuit Judge Brewer has re-stated his own opinion of the soundness of the doctrine that a voluntary assignee for the benefit of creditors possesses only those powers which are given to him (1) by the deed, and (2), by the statute; and hence that, if the statute does not confer upon him power, acting on behalf of creditors, to attack prior conveyances made by his assignor, he has no such power. This conclusion is so plain that it seems almost axiomatic. Where, it may be asked, does such an assignee get any power to deal with any property of his assignor except such as is conveyed to him in the deed? Clearly he gets it, if he gets it at all, in the language of the statute governing such assignments. And where the statute does not enlarge the title and power conferred by the deed of assignment, he has no such power; for the stream cannot rise higher than the fountain, nor can the creature be greater than the creator. Mr. Circuit Judge Brewer sees this in his usual clear-headed way, and feels bound to say that he does not concur in previous decisions in the Eighth Circuit,[2] which, we understand, go to the length of holding that if an insolvent assigns property to one creditor in payment of that one creditor's demand, that operates as a general assignment under the Missouri statute for the benefit of his creditors; or if he makes certain conveyances to secure certain of his creditors, and afterwards assigns the residue of his property under the statute, for the equal benefit of his remaining creditors, the subsequent deed of assignment avoids the prior preferances and enables the assignee to seize the property which is conveyed in the prior deeds, although it has not been conveyed to him in the deed under which he claims, and draw it into a general administration for the benefit of all the creditors of the assignor; and this, notwithstanding the fact that the right of a debtor to make preferences among his creditors has always been recognized in the jurisprudence of Missouri. We took occasion to express our opinion of these rulings in a former number,[3] and we come back to the question with the conviction that, notwithstanding the distinguished source from which they emanate, they are clearly untenable. The learned judges who rendered those decisions were evidently unable

[1] 25 Fed. Repr., 70.

[2] Martin v. Hausman, 14 Fed. Rep. 160; Dahlman v. Jacobs, 15 Fed. Rep. 863; Clapp v. Dittman, 18 Fed Rep. 423.

[3] 23 C. L. J., 83.

to get the idea out of their heads that they were administering the old bankrupt law, which in terms conferred such power upon the assignee. If we were at liberty to consider the question as one of mere policy, as the legislature might, we should say that ew feel a strong sympathy with the result reached by those decisions which prevent an insolvent from preferring particular creditors, and compel him to make distribution *pro rata* among all his creditors. The right to prefer creditors rests upon a specious and untenable foundation. All debts are debts of honor. All indebtedness is contracted by gaining the confidence of the creditor, and hence all debts should stand on an equal footing.

We have lately received a very clear printed argument on this question by Gen. C. N. Featherston, made in an important Case[4] lately pending in the Supreme Court of Georgia on a reargument. We suppose the case has since been decided, though we have not learned in what way. We are not in the habit of printing in these columns extracts from the briefs of counsel in causes either pending or decided; but this printed argument involves such clear views upon the question that we take leave to make some extracts from it:—

The True Rule.—"The authorities on this question are in some confusion; but we maintain the true rule to be, that, in the absence of statutory enlargement of his powers, a voluntary assignee for creditors can possess no other rights or powers than his assignor possessed.

Assignments by Act of Parties and by Operation of Law.—"A broad distinction exists between assignments made by act of the parties, (usually called voluntary assignments), and those made by operation of law. A failure to make this distinction has been, we apprehend, the main cause of such confusion as exists on the subject.

The Assignee's Powers Conferred either by Deed or by Statute.—"The powers of the assignee, of whichever class, are entirely derivative,—conferred upon him either by the deed of assignment or by operation of law. Inherently and apart from these, he possesses no powers or rights whatever. His powers as assignee do not originate within himself; they are all conferred upon him. He can possess no title to, or authority over, the property and rights of others without a valid conveyance from some source. An assignee, made such by act of the parties, derives his powers solely from the deed of assignment, unless there be some law supplementing or enlarging his powers. An assignee, made such by operation of law, as an administrator, assignee in bankruptcy, or under some insolvent laws, or a receiver, obtains his powers solely from the laws under which he is created such assignee. In one case we look to the contract of the parties for the assignee's powers; in the other, to the statute.

"In some States voluntary assignments for creditors are regulated by law, and the powers of the assignee defined or supplemented by statute in the interest of creditors. But in the absence of such statutes, the assignee must of necessity obtain his powers solely from the deed of assignment; and in the very nature of things that deed can confer upon him no powers which the maker of it did not himself possess.

* * * * * * * *

"Brownell v. Curtis,[5] is a leading case on this subject. (See the last three head notes.) In the opinion Chancellor Walworth states the question as follows: 'Whether a voluntary assignment by creditors of all their property and effects for the payment of their debts was sufficient to transfer to the assignee the right to revive and collect a debt once due to the assignors, but which they had cancelled and discharged previous to the assignment by collusion with their debtor, and with an intention of defrauding their creditors;' and after referring to the evidence the Chancellor proceeds: 'In the case of Bayard v. Hoffman,[6] Chancellor Kent appears to have sustained a suit by the voluntary assignee of an insolvent debtor to reach property which had been previously disposed of by assignor in fraud of the rights of creditors. It is evident, however, from the report of the case that the question was not fully considered by him. * * * It is not improbable, therefore, that my learned predecessor overlooked the distinction which exists between a voluntary as-

[4] Fouche, Assignee v. Brower.

[5] 10 Paige, 210.

[6] 4 Johns. Ch., 450.

signment by the fraudulent grantor himself, and an assigment by operation of law under the bankrupt acts.' He then cites Osborn v. Moss,[7] and Dorsey v. Smithson,[8] to the effect that an administrator cannot impeach for the benefit of creditors the fraudulent conveyance of his intestate, but that the remedy of the creditor is to hold the fraudulent grantee liable as administer *de son tort*. He says, though, that in New York this remedy of the creditor has been abolished by statute, and the right to impeach the fraudulent conveyance vested in the administrator. He concludes as follows: "It is a general rule of law that a person cannot by any voluntary act of his own transfer to another a right which he does not himself possess. And when an insolvent debtor has made a fraudulent transfer of his property, or has discharged his own debtor from liability for the purpose of defrauding his creditors, so that he cannot reclaim the property, or sustain a suit for the debt in his own name, I take it he cannot by an assignment which is wholly voluntary take away the right of his creditors generally to set aside the fraudulent transfer, or to recover the debt fraudulently discharged, and transfer that right to his own assignee for the benefit of preferred creditors, or even for the benefit of all his creditors equally.'

"In Hyde v. Lynde,[9] the suit was by the *receiver* of a mutual insurance company upon the stock note of a member. The defence was that as authorized by the charter of the company the defendant and the company had had settlement in which the note sued on had been settled and cancelled. The receiver attacked this settlement as a fraud on the creditors, and in the court below recovered. The Court of Appeals, per Bronson, Ch. J., say (on page 392) that the recovery below 'seems to have gone upon the ground that the receiver possessed greater rights than had belonged to the company;' but that 'for most, if not for all purposes, the receiver took the place and stands as the representative of the company;' that this is not the case, like some cited, of an illegal act, which neither binds the corporation nor the receiver; but the settlement being an act which the company was authorized to make, was a legal act, and even if it had been made for the purpose of defrauding creditors or other stockholders, 'I do not see,' says the Chief Justice, 'how the receiver could sue. It would be like the case of a conveyance of property made for the purpose of defrauding the creditors of the grantor, which, though void against the persons defrauded, is nevertheles valid against the grantor and all who represent him. A receiver of the effects of such grantor could not avoid the grant. Neither can this receiver avoid a settlement which bound the corporation, though in the supposed case it was a fraud upon the creditors and the other members of the company. The persons injured must sue.' 'It is not necessary, however,' continues the judge, 'to decide that question in this case; for there is no proof that the settlement was made with the intent to defraud any one." (See the opinion on pages 392-3). We call the attention of the Court to this concluding sentence, as specially applicable to the case under consideration.

"By a statute of New York, a receiver may be appointed at the instance of a creditor in proceedings supplementary to judgment, who is by the statute invested with the title of all the debtor's property, and authorized to pursue and recover for creditors property concealed by the debtor. In Bostwick v. Menck,[10] it was held that a receiver under this statute acquires no title to property previously transferred by the debtor in fraud of his creditors, 'for the reason that the transfer is valid as against ths debtor, and cannot be set aside by him [the receiver] as the debtor's successor;' that his title as successor to the debtor is limited to the property owned by the debtor at the time of his appointment; but that by the statute he is invested with the rights of creditors as against property fraudulently conveyed which is the right to recover from the the fraudulent grantee only so much of it as may be required to satisfy the debts he represents. In Yeatman v. Savings Institution,[11] the Court say, in effect, (on page 766, bottom part) that except as otherwise provided in the bankrupt act, 'the assignee takes only

[7] 7 Johns., 161.
[8] 6 Har. & Johns., 61.
[9] 4 N. Y., 387.
[10] 40 N. Y., 383.
[11] 95 U. S., 764.

the bankrupt's interest in property. He has no right or title to the interest which other parties have therein, nor any control over the same, further than is expressly given him by the bankrupt act.' etc.

"In Donaldson v. Farwell,[12] the court in the last paragraph of the opinion lay down substantially the same doctrine. In Jones v. Sykes,[13] the suit was by assignees in bankruptcy. The court, (on pages 538, 539, 540), per Lord Tenderden, C. J., say they 'are not aware of any instance in which a person has been allowed, as plaintiff in a court of law, to rescind his own act on the ground that such act was a fraud on some other person;' that what the party himself could not do, his assignees cannot; and that the only case in which assignees may recover property which the bankrupt could not, is where the property is upon the eve of bankruptcy conveyed in fraud of the bankrupt laws. In Thompson v. Dougherty,[14] the head note (next to the last) is as follows: 'Although a fraudulent settlement is void as to creditors, it is valid as to the grantor and those claiming under him, and therefore the estate settled will not pass by a general assignment for the benefit of the grantor's creditors.'"

"In Burrell on Assignments,[15] after laying down the general rule, the author says, 'sometimes a different rule is established by statute.' In Bump on Fraudulent Conveyances,[16] the author says, 'A fraudulent transfer is good against the grantor, his heirs, executors, administrators, agents, parties claiming under him, and his vendees and grantees,' citing a multitude of cases. On pages 474-5, this author says, 'If the debtor subsequently makes an assignment, the creditors may still have the fraudulent transfer set aside, for he cannot transfer any right to his assignee which he himself does not possess,' citing many cases. In the recent work of Mr. Wait on Fraudulent Conveyances,[17] the question is considered at some length, showing that while there are conflicting cases, the logical and true rule as we claimed, it is sustained by the great majority of the decisions. In High on Receivers[18] the author says, 'In general a receiver by virtue of his appointment is clothed with only such rights of action as might have been maintained by the persons over whose estate he has been appointed, and to whose rights for the purposes of litigation he has succeeded.' In § 205, he continues, 'Any defense, therefore, which a defendant might have made to an action brought by the original party, is equally available, and may be made with like effect when the action is instituted by his receiver.'

Georgia Cases as to Assignees and Receivers.—"In Seay v. Bank of Rome,[19] and in Dobbins v. Walton,[20] the general principle is held, that 'the assignee of a voluntary assignment for the benefit of creditors, stands in no better situation than the assignor.' The question in the first named case being, whether the assignment defeated the State's priority over other creditors; and in the second, whether a prior equitable lien on part of the assets was so defeated.

"In Moise v. Chapman[21] the suit was by the receiver of an insolvent bank upon a debt due the bank, to which the defendant pleaded as a set off, and tendered in payment, bills of the bank. It was admitted he might have paid the debt to the bank before its failure in these bills, but denied that he could so pay to the receiver; but the court after quoting from Lord Hardwick, that the appointment of a receiver 'does not at all affect the right,' say, 'It follows then that any defence which might have been made by the defendant against the bank, may be made by him against the receiver.'

"In Lane v. Martin,[22] the 7th head note is as follows: 'The right given the bill holder to go upon the stockholder for the ultimate redemption of the bills, is independent of any claim upon the assets of the corporation—one which may be asserted directly and in his own name, and which the assignee or re-

[12] 93 U. S., 631.
[13] 9 Barn. & C. 532; 17 Eng. C. L., 241.
[14] 12 Serg. & R., 448.
[15] § 391.
[16] 437-8.
[17] §§ 112-118.
[18] § 201.
[19] 65 Ga., 609, 615 (3).
[20] 37 Ga., 614, 619 (2).
[21] 24 Ga. 249.
[22] 8 Ga., 468.

ceiver could not enforce, as it constitutes no part of the assets of the bank." (See the opinion on page 476). In this case the bank had failed, and a receiver had been appointed by act of the legislature.

Supposed Conflicting Authorities.—Casey v. Caverock,[23] examined. Our attention has been called to this case as being perhaps in conflict with the position we assume. What was decided in that case was, that under the National Banking Act a bank receiver possessed similar powers to those of an assignee under the bankrupt laws, and might recover property conveyed by the bank to a creditor on the eve of failure in violation of the act, though as between the bank and the creditor the conveyance be good. (See the 4th head note as well as the whole opinion). But on page 487, bottom, the court say that 'whilst it is generally true that an assignee for the benefit of creditors holds the property assigned subject to the same equities as the debtor or assignor held it, it is not universally true. Many transactions would be binding on the latter which would not be binding on the assignee. All sales and securities made for the actual purpose of defrauding creditors are of this class.' This is at most a mere *dictum*, outside of the decision; but the two subsequent pages of the opinion show that the assignee here meant is not a voluntary assignee, but one having by law the same powers as the assignee in bankruptcy On page 489, top, the court say of the receiver in that case, and in support of the right claimed for him, 'He is not made receiver by a voluntary assignment of the bank, but is appointed by the magistrate *in invitum* the bank, for the very purpose of securing equal justice to all its creditors, and under a law which sternly forbids preferences. Surely such an officer, whatever may be the rule in the case of voluntary assignments, may assert those rights of the general creditors which the law itself creates, without being subject to the disabilities under which the bank would labor,' &c. And on the same page near the bottom the court says, 'Indeed, it may be laid down as a general rule, as well at the common law as the civil, that a trustee, assignee, or syndic, having the powers and occupying the relations which are sustained by a receiver under the National Banking Act, or an assignee in bankruptcy, may well oppose any privilege or preference * * void against against the general creditor's * * even though the debtor himself on account of some personal disability arising from his own acts or engagements, could not resist the claim.' So the *dictum* in question as explained goes in fact no farther than the decision. Pillsberry v. Kingon,[24] examined. The case on this subject mainly relied on by opposing counsel, is that of Pillsberry v. Kingon.[25] In New Jersey they have an elaborate statute regulating assignments, and prescribing the powers and duties of the assignee, the provisions of which are recited in the latter part of the opinion in the case just mentioned. In the previous case of Van Kreuren v. McLaughlin,[26] the court held that this statute did not confer upon the assignee the right to recover property transferred by the assignor before the assignment with intent to defraud his creditors; and the general doctrine, as claimed by us, is there strongly enforced. But in Pillsberry v. Kingon this case was overruled, and it was decided that under the statute the assignee did possess the power in question. And this is all that was decided (see the head note), though much of the opinion would indicate that the court thought the assignee possessed the power independently of the statute. So far, however, as the opinion supports this view, if it does at all, it is based mainly upon those cases which sustain a similar power in an administrator, an elaborate examination of which is gone into by the judge, and the conclusion reached that the administrator does possess such power, though it is admitted that the authorities are in conflict. Now, if it be borne in mind that the assignment which the administrator takes of the property and rights of the intestate, or of any other rights or powers which he may possess, is made entirely and necessarily by operation of law, then the argument of the New Jersey judge amounts to naught as a support to the proposition that the assignee possesses the power independently of the statute.

[23] 96 U. S., 475.

[24] 33 N. J. Eq., 287.

[25] 33 N. J. Eq., 287.

[26] 21 N. J. Eq., 163.

"*The Question Considered with Reference to Administrators.*—And this brings us to another line of authorities strongly sustaining our position, to-wit, those cases defining the powers of an administrator in this respect. It is, however, of necessity a question of statutory construction; for an administrator does not, any more than assignee, possess inherently any authority over the estate he represents. Though it is not more absurd to say that an administrator possesses powers outside of those conferred upon him by law, than that a voluntary assignee, in the absence of statute, possesses powers not conferred upon him by the deed of assignment. If then our Supreme Court hold, and the better opinion elsewhere is, that under the laws generally governing administrations, the administrator succeeds only to the rights and powers of the decedent, it follows *a fortiori* that a voluntary assignee succeeds to none greater by virtue of the deed of assignment The law might confer greater powers upon the administrator, the deed could not possibly confer greater upon the assignee.

"We cite the following among a multitude. of authorities on that subject.

"In Crosby v. DeGraffenreid,[27] a bill was filed by an administrator alleging that his intestate owed large debts, and that there were no assets with which to satisfy creditors except certain effects in the hands of the defendant to whom the intestate had in his life time conveyed them, without consideration, for the purpose of defeating the collection of a debt against him, the justice of which he denied; that these assets were not sufficient to pay the debts of the estate; and prayed for their recovery, &c. A general demurrer to the bill was sustained. The Supreme Court affirm this judgment, saying the fraudulent transfer was good against both the intestate and the administrator. The usual argument in favor of the administrator's claim of the right in question, is stated and disposed of by the court as follows: 'It was insisted that as the executor is a 'trustree' for creditors, such a transfer would not be good in equity against him. But why should there be a difference in equity? The executor is as much trustee for the creditors at law as he is in equity. And what is it that the executor is trustee of, whether in equity or at law? The property which the testator had at the time of his death. But property which he has transferred before his death, even although he may have transferred it to defraud his creditors, is not, at the time of his death, his property. The transfer takes the title out of him, and vests it in the transferee indefeasibly as to all the world except those creditors.' And the creditors, say the Court, have no title to the property, but a right to subject it to the payment of their debts. The executor cannot, therefore, be trustee of this property, any more than his testator could, if living. The executor cannot have more rights than the testator had. Besides, the court say, the creditors have an ample remedy, one in fact better, more direct and less expensive than to allow the executor to recover for them. And the mode is explained.[28]

"In Peaslee v. Barney,[29] the court say 'No man can, either at law or in equity, nor can his heirs, set aside any of his contracts because fraudulent on his part. And that which was never a right in the intestate, can never become a right and attach a remedy in the administrator. * * It has been argued that by our law the administrator represents not only the intestate, but his creditors also, especially when the estate is insolvent. He represents the intestate, who is the debtor, and certainly the law cannot be construed into such an absurdity as to vest in the same person and character, in respect to the same subject, the conflicting rights and duties both of debtor and creditor. There is nothing in any law to countenance such a motion.'

"In Davis v. Swanson,[30] the court, per Brickell, C. J., say: 'An executor or administrator is the representative of the testator

[27] 19 Ga., 290.

[28] The same doctrine is recognized in Clayton v. Tucker, 20 Ga. 452, 464-5 (4), and in Beale v. Hall, 22 Ga. 431; also in Howland v. Dews, R. M. Charlton, 383. In Ewing v. Handley, 4 Littel (Ky.), 346 (2); in Partee v. Mathews, 53 Miss. 140; and Blake v. Blake, 53 Miss. 182, the same doctrine is held and the same reasons given as in 19th Georgia. See also Winn v. Barrett, 31 Miss. 653; Snodgrass v. Andrews, 30 Miss. 472; Smith v. Pollard, 4 B. Monroe, 66; Commonwealth v. Richardson, 8 B. Monroe, 93. In Martin v. Martin, 1 Vt. 91, the same doctrine is held, even though, as the court say, the creditors, as urged by counsel, may have no remedy.

[29] 1 D. Chipman (Vt.), 321; 6 Am. Dec. 743.

[30] 54 Ala. 277, Dec. 1875; 25 Am. Rep. 678.

or intestate, succeeding to his rights, and of consequence capable of maintaining only such suits as he could maintain. He is not the representative of creditors, authorized to pursue property fraudulently aliened by the decedent, which they may pursue and condemn to the satisfaction of their demands." And the court say the Chancellor ought *ex mero motu* to have dismissed the bill by the administrator for such purpose.[31]

"*The Power Conferred by Statute in some States.*—In the latter note just cited the author says that the right to impeach a fraudulent conveyance when the estate is insolvent, has been conferred upon the administrator by statute in Massachusetts, Vermont, New Jersey, North Carolina, Wisconsin, Michigan, Ohio, Indiana, Louisiana, New York and Texas. Doubtless many of the decisions commonly cited as sustaining such right in the administrator, are based on these statutes, or on special constructions of state laws."

[31] To the same effect also, Marler v. Marler, 6 Ala. 367; Roden v. Murphy, 10 Ala. 804; Walton v. Bonham, 24 Ala. 531; and a case in 56 Ala. For a multitude of other cases cited as supporting this position as to administrators and executors, we refer the court to Bump on Fraudulent Conveyances, 438, notes 1 and 2.

DEEDS — INURING OF AFTER ACQUIRED TITLE.

The case of Salisbury Savings Society v. Cutting,[1] presents the following facts: One C., in May, 1872, procured from the plaintiffs a loan of $1,400, and mortgaged to them by warranty deed certain real estate as security, and the mortgage was at once recorded. When C. made said mortgage he had no legal title to the premises. In January, 1872, C. purchased the land in question of D., for $200, D., agreeing that upon the payment thereof by C., he would deed the land to him. D., died, and the administrators on his estate, by order of the Probate Court, conveyed the premises to C. The deed was delivered Dec. 1, 1874, and recorded Dec. 5, 1874. The mortgage was given to secure a loan obtained of the plaintiffs for the purpose of enabling C. to erect buildings on the land. Plaintiffs took their mortgage, without searching the land records of the town. One S., the defendant and father-in-law of C., had loaned him money at various times, and on Dec. 5, 1874, C. gave him a mortgage deed of the premises to secure a note for $2,483, made Dec. 1, 1874. S. took his mortgage in good faith and with no knowledge of a prior encumbrance, nor did he inquire of C. as to any. The greater portion of the loan by S. to C. was made after the mortgage to plaintiff was executed and recorded. The mortgage to S. referred to the records of the Probate Court for full particulars concerning the property.

The Court, (Park, C.J.,) did not decide the question, whether a deed of land with covenants of warranty, given when the grantor has no title thereto, should prevail over a deed given after the grantor obtains title, to a purchaser in good faith for value and without knowledge of the prior deed, but ruled that: 1. The second grantee was not a purchaser for value; that, the mortgage having been given for a preexisting debt, the later deed could not prevail. 2. That under the circumstances the second grantee was reasonably bound to enquire as to prior encumbrances and was not therefore a *bona fide* purchaser without notice.

It was, however, stated in the opinion: "If we were called upon to decide this question, we should regard it as one of very serious difficulty, inasmuch as in sustaining the later deed we should have to deny the controlling application to the case of the well settled principles of estoppel; while in sustaining the prior deed we should have to violate the entire spirit of our registry system." The reporter subjoins a very able and exhaustive article sustaining the later deed.[2]

The weight of authority.—The greater number of decisions seems to be in favor of sustaining the prior deed, upon the familiar principle of an estoppel operating against the grantor in the first deed and any subsequent grantee under him.[3]

[1] 50 Conn., 113.

[2] The following cases are cited in this article: *Pro* prior deed: 3 Wash. on Real Prop. ch. 2, § 6, art. 50. Requirements in searching title. Calder v. Chapman, 52 Penn. St., 359; Wood v. Farmere, 7 Watts, 385; M'Lanahan v. Reeside, 9 Watts, 510; Loan Trust Co. v. Maltby, 8 Paige 361. *Contra*—prior deed: 3 Smith's Lead. Cas. (7th Am. Ed.), 692, side p. 626; Rawle on Cov. of Title, 4th ed. 428; Wade on Law of Notice, § 214; Bigelow on Estoppel, p. 331; Way v. Arnold, 18 Ga. 181, and others.

[3] Washburn on Real Prop. (4th ed.), page 109, and

But we submit that a careful study of the cases and of the principles underlying the various decisions, shows the weight of authority to be against sustaining the prior deed. We desire to keep the question we are discussing distinct from that of simple precedence between *bona fide* purchasers, which is covered by the recording acts of the different States, and will assume for the purposes of this article, that both deeds are duly recorded in the order of their respective dates.

The Recording Acts—Notice.—The decisions favoring the estoppel are based upon the English law to a great extent. So far as we can learn, there is in England no system of registration of deed, except in two registrar counties.[4] So that in this country where a system of registration exists in every State in the Union, there are greater equities in favor of the subsequent grantee. In addition to the English, cases "We must, of course leave out of consideration * * * 2. All the American cases upon leases; 3. All American cases which concerned only the grantor and heirs; and 4. All American cases where, although assigns were held bound, the question of the effect of registry laws was not raised. It is believed that a large part of the English cases so often cited, where assigns are held estopped were cases of * * * feoffment, fine and common recovery, which, being matters of record or presumed public notoriety, were, from public policy, held to be known to all persons; or secondly, and much the largest portion, cases of leases in which there is a privity of contract and a privity of estate also." [5]

If the title inures to the grantee under the first deed, it must be by reason of estoppel, and not because the recording of the first deed operates as a notice to the subsequent purchaser of the existence of the prior deed, as this certainly would conflict with the entire spirit of our recording acts, as construed by the courts of last resort in the different States. To a court seeking to do equity as between the parties before it in a case of this character, it would seem that the question would of necessity arise, whether one, under our complete system of registry, can be prejudiced by purchasing that which a search of the records would show had no existence.

Washburn in his valuable work on Real Property [6] declares that "a party to a deed is estopped to deny anything which has operated upon the other party as the inducement to accept and act under such deed." Is the first grantee legally warranted in relying upon such affirmations; or does the law require that he search the records before he can be justly entitled to such a standing in court as shall be to the prejudice of a *bona fide* purchaser without notice? "Which party ought equitably to be favored,—he who carelessly took a deed when his grantor had no title or possession, and without requiring of his grantor any evidence of his title, or he who bought of the grantor when the grantor was in possession and had a title, which the records showed he had not conveyed away? *Vigilantibus et non dormientibus jura subveniunt.*" [7]

As to the second grantee, "The rule clearly is and must be, that the searcher is expected to look only to the chain of title, beginning in the case of each particular grantor only with the conveyance to him, and inquiring for any later conveyance made or incumbrance created by him." [8]

So it is decided by the court in Faircloth v. Jordan,[9] that in cases of the class under consideration, "the doctrine of estoppel by

cases cited; Bank of Utica v. Mesereau, 49 Am. Dec. 189 and note 231; s. c. 3 Barb. Chan. 528; note to Trull v. Eastman, 39 Am. Dec. 129; note to Smith v. Widlake, 30 Eng. Rep. 17; Knight v. Thayer, 125 Mass. 25 See discussion of the cases in Bigelow on Estoppel' p.p. 334 to 363; Holbrook v. Debo, 99 Ill. 372. As to Covenants for title in mortgaga—averment of legal estate—see General Finance, &c., Co. v. Liberator Bld'g., &c., Soc., 26 Eng. Rep. 463, and note 471; s. c. 10 Chan. Div. 15.

[4] 3 Wash. Real Prop. (4th ed.), p. 313, § 590.

[5] Potter, J., 10 R.I. 610; citing Rawlyns' case, 4 Coke, 52, case of a lease; *Doe ex dem.* Christmas v. Oliver, 5 M. & R. 202, case of a fine; Trevivian v. Lawrence, 1 Salk, 276; s. c. 6 Mod. 256, on a judgment. Webb v. Austin, 7 M. & G. 701; s. c. 8 Scott N. R. 419, case of lease; Weale v. Lower, Pollexfen, 54, case of fine on contingent estate; s. c. 8 Scott, N. R. 419' 446; Taylor v. Needham, 2 Taunt. 278, lease; Sturgeon v. Wingfield, 15 M. & W. 224, lease; Blights Lessee v. Rochester, 7 Wheat, 535; Carver v. Jackson, 4 Pet. 1, case of recital in a deed.

[6] (4th ed.) vol. 3, p. 94; see also Herman's Law of Estoppel, 291.

[7] Potter, J., 10 R. I., p. 612.

[8] Reporter's note, 50 Conn. 113; and see cases cited *ante* note 2, under "Requirements in searching title."

[9] 18 Ga. 350.

deed * * * is in direct conflict with much of the law contained in our Registry Acts. In Way v. Arnold,[10] decided in 1855, the statement is made, that "we are strongly inclined to the opinion that our Registry Act under the modern form of conveyancing is a virtual repeal of the doctrine of estoppel."[11]

In the note to Le Neve v. Le Neve, where the law of notice is exhaustively treated, it is asserted that "a purchase from one who has no right to convey is invalid, and should not be set up on technical grounds against a grantee who gives value after the vendor acquires a title."[12]

To the same effect are the words used in Hare and Wallace's notes[13] that "to allow a title to pass by a conveyance executed and recorded before it is acquired, may therefore be a surprise on subsequent purchasers against which it is not in their power to guard, and it is contrary to that equity which is the chief aim of the doctrine of estoppel as moulded by the liberality of modern times."[14]

In McCusher v. McEvey,[15] although the court (Potter, J, dissenting) decided in favor of the inuring of title by estoppel to the first grantee, still it was admitted, that "the doctrine has been inpugned by the American annotators of Smith's Leading Cases and by Mr. Rawle," that the argument by them "in support of these views is certainly very strong, if not theoretically unanswerable;" and it is suggested that the necessity exists for a statute which shall "carry into full effect the policy of our recording act, and prevent its operating, in cases of this kind, as a snare rather than as a protection to purchasers."[16]

Potter, J.,[17] reasons that: "Under our system of registry, * * * the first grantee in this case could have accertained by examination of the records, whether W. (the grantor) * *, had a good title to the land, and if he found no title there, or any thing to put him on his guard, could have required W. to satisfy or secure him. The second grantee, going to the records, would find that W., at a certain date, had acquired title and had not conveyed it away since that date. Is it reasonable to require him to examine further so far as relates to his acquiring whatever title W. had at that date. On the other hand, he would be required to examine whether his grantor had not conveyed away the land before he bought it, and so on as to every preceding grantor indefinitely."

The Estoppel.—Under the old form of conveying by feoffment, fine or common recovery, existing prior to Charles the Second's time, the grantor made entry upon the land, delivered possession and a deed was taken as a memorandum of the transaction. If the grantee became dispossessed, he might bring action by *warrantia chartæ* to recover land similar to that of which he had been dispossessed.

The statute of uses with its bargain and sale deeds did away with these modes of conveyances; deeds of this character could not create a present interest in land in which the grantor had no title, nor divest the previously vested estate of third persons. If the grantor conveyed what he did not have, the covenants were broken at once and an action for damages lay. The old warranty was a covenant real; the new, a covenant personal, so that the same reasons and analogies, true under the old technical warranty, are not applicable to the modern covenants of warranty. "As to the covenant of warranty, it is settled that, in order to run with the land, there must be an estate to support it, and where no estates passes, it does not run with the land, but is a new personal covenant on which only the first grantee could sue."[18]

The old warranty rebuts or bars a party from claiming land which he had already conveyed, and hence it acts as a sort of an es-

[10] 18 Ga. 181.

[11] White & Tudors Lead. Cas. in Eq. (4th Am. ed.), Hares' notes, vol. 1, part 2, pp. 210 *et seq.*

[12] Citing Lloyd v. Lloyd, 4 Drury and Warren, 369; 2 Connor & Lawson, 598. See also, vol. 1, part 2, White & Tudors Lead. Cas. in Eq., p. 41, under "*bona fide* purchasers."

[13] 2 Smith's Lead. Cas. p. 700, *et seq.*

[14] Rawle on Cov. for Title (3rd ed.) 430.

[15] 9 R. I. 528.

[16] Opinion by Durfee, J.

[17] Dissenting opinion, 10 R. I. 606.

[18] Potter, J., 10 R. I. 613; citing Slater v. Ransom, 1 Met. 450; Platt on Cov. (S. P.) 525; Noke v. Auder, Cro.' Eliz.' 373; Comyns Digest, Covenant, B. 3; Wheelock v. Thayer, 16 Pick. 68. "So if evicted" Randolph's admr. v. Kinney, 3 Randolph, 396. "Possession gives sufficient estate to carry covenant." Fowler v. Policy, 2 Barb. 300; s. c. 6 Barb. 166. On the point that covenants of warranty ordinarily run with the land, see Brown v. Staples, 48 Am. Dec. 504, and note, 507.

toppel. But the estoppel asserts the existence of a good title, while a modern warranty is an undertaking to defend the title if not good. The deed of bargain and sale being ineffectual to create an estate not before existing, it is evident that an estoppel as such could not grow out of the warranty in such a deed. The old warranty by itself could never pass present and subsequent estates, else there would have been no occasion for a fine, feoffment or common recovery. The warranty of the Statute of Uses merely confirms existing rights, and cannot transfer rights not vested in the grantor at the time when the conveyance is executed, and unless it be construed as a covenant to warrant and defend the land conveyed, the grantee under the deed has no protection. If so construed, the grantor may be held in damages for eviction or failure of title, and in order to prevent circuity of action he and those claiming under him by descent are barred from claiming the land they stipulated to defend. From this it appears that the modern covenant of warranty does not act as an estoppel to bar persons other than the grantor or his heirs.[19] "The covenant, to have this effect must be something more than the personal covenant of him who makes it. It must be of a nature to run with the land." [20]

Circuity of Action.—The principle of estoppel is said to be founded "in equity and justice, as well as the policy of the law," to repress litigation and prevent a circuity of actions, and is "sure to administer strict and exact justice." [21] But circuity of action, is not avoided by the grantor and his assigns under the second deed being estopped from setting up any title adverse to that of the grantee under the first deed. "Another lawsuit is not prevented; it is merely left to the second grantee." [22]

The Statutes.—While statutes exist in some of the States [23] they fail to meet the equities of the case, In conclusion, in this article we have brought together a few cases and dissenting opinions, trusting that "strict and exact justice" in the premises will at least urge upon the bar associations of our several States the necessity of some legislative action towards securing titles to land where the party purchasing the same has, in searching the proper records, conformed to the necessary requirements of the law and is otherwise a *bona fide* holder for value.

JOSEPH A. JOYCE,
GEORGE W. WHEELER.
Bridgeport, Conn.

[19] Smith's Lead. Cas. Vol. II, p. 692; Hare & Wallace's notes; Bigelow on Estoppel, pp. 322-334, Lumpkin, J., in Way v. Arnold, 18 Ga. 181, digests what is said on this question in Smith's Lead. Cases.

[20] Herman's Law of Estoppel, 293; Faircloth v. Jordan, 18 Ga. 350; citing Co. Litt. 352a. See Rawle on Cov. for Title, 427 to 466.

[21] Comstock v. Smith, 13 Pick. 116.

[22] 10 R. I. 608, 613, 614; citing Buckingham v. Hanna, 2 Ohio, 551; Senator Tracy in Jackson v. Waldron, 13 Wend. 178, and Wark v. Willard, 13 N. H. 389.

[23] Arkansas, Rev. Stat. 1838, ch. 31, § 4. California, § 1106 of Civil Code; Illinois Rev. 1845, p. 104; Hurds Rev. Stat. of Ill. Ed. 1883, p. 279, § 7; Mo. Rev. Stat. 1879, vol. 1, p. 675, § 3940; Nebraska, § 51, p. 394; Comp. Stat. Neb. (Laws 1875 p. 90). The Va. Code, being interpreted, will probably apply to the question under discussion. Code of 1873, ch. 114, § 12, p. 898. West. Va. Stat. is more explicit. Code of West Va. 1868, chap. 74, § 10.

FRESH INJURY ARISING FROM ORIGINAL TORT.

"There must be not only a thing done amiss, but also a damage, either already fallen upon the party, or else inevitable," observed Hobart, C.J., of old, in Waterer v. Freeman,[1] referring to cases in which the existence of an injury is necessary to constitute the infringement of a right, damage being there an essential element in the right of action, and not merely a consequence flowing from it. Otherwise, where the act done amiss was, in itself, an invasion of an absolute legal right, in which cases at least nominal damages are recoverable *eo instanti*, for "an injury imports a damage when a man is thereby hindered of his right," as Holt, C.J., put it in Ashby v. White.[2] Now, the Statute of Limitations commences to run when a complete and perfect cause of action has accrued, within either of those categories; but the great difficulty lies in determining within which of them each particular case falls. And it was a difficulty of this kind that arose in the Irish case of Devery v. the Grand Canal Co.,[3]

[1] Hob., 267 a.

[2] Ld. Raym.

[3] Ir. R., 8 C. L. 511, 9 Ib. 194.

where it appeared that, prior to 1866, a stream was conveyed by the defendants under and across their canal through two wooden tunnels, for which, in 1866, they substituted metal tunnels of less capacity, the consequence being that the stream, after heavy rains, in 1873, flooded the plaintiff's adjacent lands. It was held by the Court of Common Pleas,[4] that the substitution of the smaller for the larger tunnels was in itself an innocent act without either *injuria* or *damnum*, and only became tortious upon the subsequent flooding, and that the Statute of Limitations began to run from the time of the flooding in 1873; and by the Court or Exchequer Chamber that the continuance of the wrongful obstruction, causing fresh damage in 1873, constituted a fresh cause of action, and that, therefore (affirming the decision of the Common Pleas, on this different ground), the statute began to run from the time of the damage so then caused.

The difficulty in question arose, also, but with fresh complications, in the recent English case of Mitchell v. Darley Main Colliery Co., to which the report in a recent number of *Law Times* recalls our attention.

It was an action to recover damages for injuries done to three cottages and a small quantity of land belonging to the plaintiff. The writ was issued on the 27th of December, 1882, and when the action itself came on for trial before Hawkins, J., at Leeds, in August, 1883, it appeared that the facts were as follows: The plaintiff became the owner, in the year 1866, of six perches of land situate in the parish of Darfield, in the county of York. The defendants were the lessees of a seam of coal lying under the plaintiff's land and the land adjoining, and they worked the said seam of coal during the years 1867 and 1868, but not afterwards. Owing to this working by the defendants, a subsidence of the plaintiff's land took place between the years 1868 and 1871, and six cottages belonging to the plaintiff which then stood upon that land were damaged by the subsidence and were repaired by the defendants. About the year 1878 these six cottages were pulled down by the plaintiff, and three other cottages were erected on their site. In the year 1882 a further and second subsidence, but which was caused by the same workings of the defendants in the years 1867 and 1868, took place, and in consequence damage was done to the plaintiff's land, and to the three cottages then standing thereon. The action was brought to recover damages in respect of the injuries arising out of the subsidence which took place in the year 1882, and the defendants pleaded (*inter alia*) that the alleged causes of action did not arise within six years before action brought, and that the plaintiff's right to sue was barred by the Statute of Limitations. The jury was discharged by consent, and the case was reserved by Hawkins, J., for further consideration; and, upon further consideration, the learned judge ordered judgment to be entered for the defendants, holding himself bound by the decision of the Queen's Bench Division in Lamb v. Walker.[5] From that decision the plaintiff appealed, with the result that Brett, M. R., Bowen and Fry, L. J. J., reversed the judgment of Hawkins, J., and overruled Lamb v. Walker. In effect, indeed, it was an appeal from the judgment of the majority of the Queen's Bench Division in that case (Cockburn, C. J., diss.), which was itself founded on Nicklin v. Williams;[6] and though Nicklin v. Williams was approved, moreover, by Lord Westbury in Backhouse v. Bonomi,[7] it too must be taken to stand overruled by the decision of the Court of Appeal. On the other hand Whitehouse v. Fellowes, approved as we have seen in the Irish case of Devery v. The Grand Canal Co. (to which no reference was made), was accepted and applied. Such was the conflicting condition of the authorities, indeed, that Fry, L. J., thought, rightly as it seems to us, that the question should be determined merely upon principle. "Now," said he, "with reference to principle, I think that all damage which arises from one and the same cause of action must be sued for and recovered at one and the same time, and therefore it becomes necessary to inquire what the cause of action is in a case of this description, Bowen, L. J., has pointed out that the cause

[4] Following Whitehouse v. Fellowes, 10 C. B. (N. S.) 765.

[5] 3 Q. B. Div., 389.

[6] 10 Ex., 259.

[7] 9 H. L., 512.

of action may be stated in two ways. It may be said that the subsidence caused by the defendants is itself an interference with the property of the plaintiff, and as such is itself the cause of action; or it may be said the defendants' allowing the excavation to continue without proper support to the surface so as to occasion damage to the plaintiff is the cause of action. I do not think it is very material to inquire which of the two is the more accurate way of stating the cause of action. I am inclined to agree with Bowen, L. J., that the subsidence, the result of the acts or omissions of the defendants, is an interference with the property of the plaintiff, and as such is itself the cause of action. If this be so, then it is plain that a second and independent subsidence is an independent cause of action. But even if the other view is the more correct one, even then it appears to me that the cause of action is not the same in the case of a second subsidence as in the case of the first, and for this reason: that whereas the cause of action in the case of the first subsidence may be said to be the excavating a cavity and not supporting the surface, the cause of action in the second case may be said to be the continued act of omission which leaves the cavity in such a condition as to be continually liable to cause damage to the plaintiff. The mere withdrawal of the stratum of coal in itself is a perfectly legitimate act, and it is only because it is done without doing something else which would prevent injury to the plaintiff that the cause of action arises. I desire to make one other observation. It has been suggested that the excavation, though in itself a lawful act, may become wrongful in consequence of a subsequent subsidence following upon it. I do not think that position can be maintained, because, I confess, it seems to me difficult to suppose that an act, lawful at the time it was done, can become unlawful in consequence of the subsequent effect of it. But supposing this to be so, it would then follow that the excavation was only wrongful to the extent of the subsidence that had already occurred, and therefore it seems to me impossible, in an action at the time when one subsidence has occurred, to recover damages not only for the subsidence that has made the excavation wrongful, but also for a subsidence which has not occurred and therefore which cannot have made the excavation wrongful in respect of that future subsidence. I do not desire to add more, inasmuch as the judgment of Cockburn, L. C. J., in the case of Lamb v. Walker,[8] seems to me to state the principle which I wish to adopt." That principle, which, though it may lead to a conflict with Smith v. Thackerah,[9] Bowen, L. J., also confessed he was not afraid to lay down, was that each fresh interference with the enjoyment of property is, as it arises, a wrong done, and creates a new cause of action; and so, that each subsidence, as it is occasioned, becomes as it arises a fresh interference with the enjoyment of the neighbor's property, provided it is an appreciable and substantial interference, and, therefore, that each subsidence itself creates a new cause of action. "The judgment of the Lord Chief Justice," said Brett, M. R., "might have been founded entirely on Backhouse v. Bonomi,[10] but instead of this he appears to me to examine the whole subject afresh, and he gives most forcible reasons to show that in these cases the only cause of action is the subsidence of the plaintiff's land, and that, if that subsidence has been brought about by the defendants, each subsidence is a new cause of action. The Lord Chief Justice goes on to put the case thus, and I cannot see any answer to it. He says that, where an excavation has been made and a subsidence has taken place, it may be true that for all effects, existing and prospective, of that subsidence the person injured ought to sue at once. Very likely he ought. I am inclined to agree with that, though it is not necessary to decide in this case. But what is to be done as to a new subsidence? The mine-owner, who knows that the effect of his excavation has been to injure his neighbor's property, has two courses open to him: he may leave the excavation as it is and run the risk of it causing a new subsidence; or he may prop it up and counteract the possibility of fresh damage. The Lord Chief Justice points out that the jury who are to assess the damages for the first subsidence cannot possibly give damages for a prospective new subsidence

[8] *Ubi sup.*
[9] L. R., 1 C. P. 564.
[10] *Ubi sup.*

which the defendant has full option to prevent if he pleases, and that the jury cannot take into consideration the prospective damage which may occur from a new subsidence when it may be that, at the very moment they are doing so, the mine-owner may be taking steps to render any further subsidence impossible. I have said that I see no answer to this way of putting the case, and I think that the reasoning of the Lord Chief Justice, even without reference to Backhouse v. Bonomi,[11] is conclusive to show that each subsidence is a fresh cause of action." It certainly does not follow necessarily that, because an action would not lie until the first subsidence, a new action would lie for every subsequent subsidence; but, it is submitted that we have now ample authority, resting upon sound principle, in support of that position, which may well stand with the general rule[12] that all the damages which flow from a particular act are recoverable in, and must be sued for in the same action.—*Irish Law Times.*

[11] *Ubi sup.*

[12] Also recently recognized in Brumsden v. Humphrey, 11 Q. B. D. 721.

ASSOCIATED RAILWAYS LIABLE AS PARTNERS.

BLOCK v. ERIE AND NORTH SHORE DESPATCH FAST FREIGHT LINE.*

Supreme Judicial Court of Massachusetts, May, 1885.

If several railroads forming a continuous line agree, under a certain name, to carry goods from and to distant points, and if, in so carrying goods for a party, a portion thereof is lost, such party has his remed against such roads as co-partners, and may recover from them jointly or severally for the loss sustained.

Linus M. Child, for plaintiff; *Soheir & Welch*, for defendant.

MORTON, C. J., delivered the opinion of the court:

The evidence at the trial tended to show that the several defendant corporations formed an association or company, under the name of "The Erie and North Shore Despatch," for the transportation of merchandise between Boston and Chicago; that the association had an agent in Boston who was authorized to receive goods at Boston for transportation over the line to Chicago, and to give bills of lading or contracts for transportation like the one upon which the plaintiff sues; that the plaintiff delivered goods to such agent, and received the bill of lading in suit; and that a part of the goods were lost between Boston and Chicago. By the bill of lading, "The Erie and North Shore Despatch" contracts to carry the goods from Boston by the Fitchburg Railroad, and thence by the Erie & North Shore Despatch to Chicago, and then to deliver them to connecting railroad lines to be forwarded to Denver, their destination. The several railroad companies which form the association are not named in the contract. It is a single and indivisible contract, by which the Erie & North Shore Despatch Line agrees to carry the goods to Chicago, the freight to be earned upon the delivery there to the connecting line. So far as the question in this case is concerned, it is unlike those cases where a railroad forming one link in a line of connecting roads between two points receives goods to be transported over its line and delivered to the connecting road, in which it has been held in this commonwealth that each railroad in the continuous line is liable only for loss or damage happening on its own road. Darling v. Boston & W. R. Co., 11 Allen, 295; Gass v. New York, P. & B. R. Co., 99 Mass. 220; Burroughs v. Norwich & W. R. Co., 100 Mass. 26; Aigen v. Boston & M. R. R. 132 Mass. 423.

The defendants formed a company, and in its name made a special contract to carry the plaintiff's goods from Boston to Chicago. They are, so far as the plaintiff is concerned, partners, and liable jointly and severally for any loss or damage to his goods between Boston and Chicago, unless they are exempted from liability by the terms of the contract. Hill Manuf'g. Co. v. Boston & L. R. Co., 104 Mass. 122. The principal difficulty in this case is as to the true construction of the contract of carriage. It contains the provision that in case of loss or damage to the property received, "whereby any legal liability or responsibility shall or may be incurred, that company shall alone be held answerable therefor in whose actual custody the same may be at the time of the happening thereof." It also contained a provision that in case of loss or damage of any of the goods, "for which either of said companies may be liable, it is agreed that said company shall have the benefit of any insurance effected thereon by the owner. The defendants contend that the expression "that company," in the clause above cited, means that railroad company in any part of the continuous line between Boston and Denver so that, although the plaintiff's loss occurred between Boston and Chicago, that railroad company in whose custody the goods were when lost is alone liable. This is not the necessary, and we do not think it the fair, construction of the defendant's contract. By it the Erie & North Shore Despatch, as a company, undertake to carrying the goods to Chicago, and there to deliver them to a connecting line. The several railroads which

* S. C. 1 N. Repr., 348.

constitute this company are not named or referred to in the contract. It is in the same terms as if the Erie & North Shore Despatch had been a single railroad corporation, with a road from Boston to Chicago. In other parts of the contrac the expressions "this company and "said company" are used in connections which clearly show that they refer to the defendant company, and not to any railroad company between Boston and Chicago. Thus, there is the provision that it is "agreed that the Erie & North Shore Despatch will not be liable for loss or damage or delays to the above goods on any river or lake;" and "said company will not be liable for any loss" by guerrillas or military seizures. So there is the provision that, "in consideration that this company has reduced the price of such transportation below the local rates, the shipper and owner does hereby release the Erie & North Shore Despatch, and the steam-boat and railroad company which may receive said property, from liability for breakage," etc. In these clauses the word "company" clearly refers only to the defendant company, and the connecting company or companies between Chicago and Denver.

The words "said company" or "said companies," used in the clause as to insurance, and other places, by their natural interpretation refer to companies which have previously been named. We cannot see why the words "that company," in the clause we are considering, should receive a different construction from that given to equivalent or similar words in other parts of the contract. The plaintiff was dealing with the defendant company alone for the transportation as far as Chicago. He did not know the parties who composed that company, and entered into no separate contract with either of them. He had the right to interpret the words "that company" as meaning the defendant company, and not a railway company nowhere named in his contract. The effect of this intrepretation is, what seems to have been in the minds of the parties, to release the defendant company from liability after it had carried the goods to the end of its route, according to its contract, and had delivered them to the connecting carrier, and to hold it liable to the point to which it had assumed and contracted to transport the goods as a common carrier.

We are of opinion that this is the fair construction of the contract, and therefore that the learned justice who presided at the trial in the superior court erred in directing a verdict for the defendants. Exceptions sustained.

NOTE ON THE LIABILITY OF CARRIERS OVER CONNECTING ROADS.—It is a general rule than when goods are transported by several carriers over a connecting chain of roads, each is responsible for loss or damage occurring only while the property is on his own line.[1] And his liability terminates when delivery has been made to the next carrier.[2] But an intermediate carrier does not relieve himself from responsibility by simply unloading the goods at the end of his route and storing them in his warehouse, without delivery or notice to, or any attempt to deliver to, the next carrier.[3] But it is equally well settled that railroad companies, as common carriers, may make valid contracts to transport property beyond the limits of their own roads, and that when they do, they are bound to deliver the property at its place of destination, and are liable for all injury to such property prior to its delivery, although such injury happens after the property has passed over their own road on its way, and while in the charge of other carriers over whom they have no actual control.[4] In such case the connecting roads are considered the agents of the receiving road, and it is liable for their default.[5] If the carrier receives goods consigned to a point beyond the terminus of his own route, the English cases hold that he must be presumed, in the absence of express stipulations, to have contracted for responsibility over the entire distance.[6] But in America an exactly opposite doctrine prevails, and it is held that the carrier will not be understood to have bound himself for liability beyond the limits of his own road unless there is a special contract to that effect.[7] In New York, however, there is a statutory provision establishing such liability.[8] It appears that if the receiving road does bind itself by such a contract, then it alone is liable to the shipper for a loss occurring beyond its own terminus, and he cannot maintain an action against the connecting line.[9]

On the subject of partnerships between railroad companies in regard to freight and passenger business, the decisions are not at all numerous, and the principal case will therefore be an important addition to the authorities on this point. But so far as can be gathered from the rulings that have been made, the tendency seems to be, to require an actual sharing of profit and loss among the associated companies, or some other arrangement between them which shall be clearly incompatible with the absence of a partnership. Thus, where several roads form one continuous line, and a freight-rate fixed by mutual agreement is charged for though service, collected by the carrier whose line includes the end of the route, and divided between them in an agreed proportion, this is not sufficient to establish a partnership or to fix upon them a joint liability to shippers of goods.[10] In the same line we may cite a recent decision of the United States Supreme Court. It appeared that a despatch company agreed with certain railroads (whose connecting lines formed a continuous road), that they should receive and transport all freight sent them by the despatch company at certain fixed rates; the railroad companies agreed among themselves that the amount charged for the transportation of such freight, where

[1] Hunt v. New York, &c., R. R. Co., 1 Hilt. (N. Y. C. P.) 228.

[2] Condon v. Marquette, &c., R. R., 19 Reporter, 54; Baltimore, &c., R. R. v. Schumacher, 29 Md. 176.

[3] McDonald v. Western Railroad Corp., 34 N. Y. 497.

[4] Morse v. Brainard, 41 Vt. 550; Railroad Co. v. Pratt, 22 Wall. 123; Penna. R. R. Co. v. Berry, 68 Pa. St. 272; Kyle v. Lawrens R. R., 10 Rich. L. 382.

[5] Pereira v. Cent. Pac. R. R. 18 Rep. 812; Galveston, etc., R. R. v. Allison, 16 Id. 28.

[6] Muschamp v. L. & P. Junction Ry., 8 Mees. & W. 421.

[7] Hood v. N. Y. & N. H. R. R. Co., 22 Conn. 1; Converse v. Norwich & N. Y. Trans. Co., 33 Conn. 166; Perkins v. Portland, &c., R. R., 47 Me. 573; Penna. R. R. Co. v. Schwarzenberger, 45 Pa. St. 208.

[8] Burtis v. Buffalo, &c., R. R., 24 N. York, 269.

[9] Bristol, &c., Railway v. Collins, url. & Nor. 969.

[10] Gass v. New York, &c., R. R., 99 Mass. 220; Straiton v. New York, &c., R. R., 2 E. D. Smith, 184. But see Carter v. Peck, 4 Sneed, Tenn. 203.

it went through, should be divided between them according to the length of their respective roads; that each company should pay for losses occurring on its road; and that on such freight the last carrier should collect the charges from the consignee, deduct its share thereof, account in the same way to the next company, and so on to the first. Periodical settlements were had between the railroad companies, and each settled separately with the despatch company. On this state of facts it was held that such arrangement between the railroad companies did not make them partners either *inter sese* or as to third persons.[11] At the same time it must be remembered that while such an agreement between carriers, for the collection and division of freight-money, may not amount to a partnership, so as to lay the foundation for a joint action against them all, yet the receiving road will become responsible for the default of any of the associated lines, even without a special contract.[12] Again, where two connecting carriers agreed for a division in fixed proportions of the total amount of freight which should be paid to each on goods received for transportation from the other, this was held not to constitute a partnership between them.[13] On the other hand, where several railroads, whose lines formed a through connection from Boston to Montreal, arranged together for an excursion over their several roads from the former place to the latter, and the plaintiff bought a through ticket from the road at the Boston end of the route, and his baggage was lost in transit, the question whether a joint action would lie against all the corporations which united in this common enterprise was suggested but not decided; but it was held that at any rate the the plaintiff had a good cause of action against the road from which he purchased his ticket.[14] And in general, we may state the conclusion of the modern authorities to be, that the carriers must not only be associated in a common enterprise, in order to establish a partnership and fasten a joint liability upon them, but that there must be a division of profits and losses out of a common fund, as distinguished from the payment to each road of the freight it has individually earned according to an agreed schedule.[15]

H. C. BLACK.

[11] Insurance Co. v. Railroad Co., 104 U S. 146; Deming v. Norfolk, &c., R. R., 18 Reporter, 37.

[12] Phillips v. North Carolina R. R., 78 N. C. 294; Nashua Lock Co. v. Worcester, &c., R. R., 48 N. H. 339.

[13] Merrick v. Gordon, 20 N. Y, 93. And see Darling v. Boston & W. R. R., 11 Allen, 295.

[14] Najac v. Boston & L. R. R., 7 Allen, 329. And see Fitchburg, &c., R. R. v. Hanna, 6 Gray, 539.

[15] See, in addition to authorities cited above, Irvin v. Nashville, &c., R. R., 92 Ill. 103; Croft v. Baltimore, &c., R. R., 1 MacArthur, 492.

THE DRAFTING OF WILLS.

BAKER'S APPEAL.*

Supreme Court of Pennsylvania, Jan. 19, 1885.

1. *Wills.* [*Drafting.*]—*Parts on Separate Pieces of Paper.*—Any relevant paper, in existence at the time a will is executed, may be so referred to in the body of the will as to become incorporated therein. The intention of testator to so incorporate such a paper must appear upon the face of the will. It cannot be established by extrinsic proof; although such paper may be identified by extraneous testimony.

2. ——. ——. *When Deemed "Signed at the Close Thereof."*—A will is to be read in such order as the testator manifestly intended; and, if it is signed at the close of what is evidently the end of testator's dispositions, it is "signed at the end thereof" within the Pennsylvania Act of 1833.

3. ——. ——. [*Illustration.*] — *Reference to Amendment on Another Page.*—A will written on the first and third pages of a folio of foolscap paper—the paragraphs being numbered consecutively—and signed and attested at the foot of the third page, but containing an erasure in the fourth paragraph upon the third page, and an interlineation referring to the next page, upon which appeared a paragraph numbered "4th," which, however, was not signed or attested, is "signed at the end thereof" in point of fact and conforms to the act of 1833.

Appeal of David S. Baker from the decree of the Orphans' Court of Washington county, reversing the decree of the Register, admitting to probate a paper writing as the last will and testament of George Baker, deceased.

Messrs. Boyd Crumrine and *J. W. & A. Donnan*, for the appellant; *Messrs. A. W. & M. C. Acheson*, *contra*.

The sixth section of the Act of 8th April, 1833, P. L., 249, provides that "every will shall be in writing, and, unless the party making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof," etc. The construction which had been previously given to the Act of 1705 made this provision necessary; the plain purpose of the legislature in requiring the signature of the testator to be written at the end of the will was to assimilate wills in the mode of their execution to other instruments for the transmission of title, to furnish a more certain and satisfactory means of authentication, and thus to distinguish what might be mere incomplete memoranda from that which certainly declared the full and final purposes of the testator respecting his property. That this was, at least, the primary and principle object of the statute of 1833 is abundantly shown, not only in the report of the commissioners (Parke & J. 874), but in numerous decisions of this court since its passage. Stricker v. Groves, 5 Wharton, 385; Hays v. Harden, 6 Barr, 409. It is the *animus testandi*, therefore, which is manifested by the testator's signature to a will, and, unless signing be prevented by an absolute inability, the fact of a completed testamentary disposition cannot otherwise appear.

The will of George Baker is commenced upon the first, and is formally concluded upon the third page of a folio of foolscap paper. The fourth page of the paper, however, contains another and further testamentary provision, and, as the signature to the will is at the end of what is written on the third page, it is urged, on the one side, that it is not signed, according to the statutory requirement, at the end thereof; on the other side, it is

*S. C., 15 Pittsb. Leg. Jour. (N. S.), 311, from which the head-notes are taken.

contended that what is written on the fourth page is, by clear reference, incorporated into the body of the will, and that although the signature is not at the end of the writing, in point of space, yet if the item on the fourth page be drawn into its appropriate and clearly intended connection, on the third, the signature will then appear at the end of the will in point of fact.

It will not, we think, be seriously questioned, notwithstanding the provisions of the act of 1833, that any relevant paper or writing, attached or detached, if there be no reasonable question as to its identity, or if its existence at the execution of a will, may be so referred to therein, as thereby to become incorporated with its provisions. No case in Pennsylvania has been cited by counsel, with the exception, perhaps, of Hauberger v. Root, 6 W. & S. 431, in which this rule is expressly asserted, nor, in the somewhat hasty search we have made, do we find any, in which the precise point is presented, but in England, and in the courts of some of the States, under similar statutes, the doctrine is distinctly declared.

In Habergham v. Vincent, 2 Vesey, Jr. 223, which was a case decided under the statute of frauds, Wilson, J., sitting with Lord Chancellor Loughborough, says: "I believe it is true, and I have found no case to the contrary, that if a testator in his will refers expressly to any paper already written, and has so described it, that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper, whether executed or not, makes part of the will; and such reference is the same as if he had incorporated it, because words of relation have a stronger operation than any other." This case was followed *In re* Countess of Durham, 3 Curtis, 57, and in many other cases, both in the civil and ecclesiastical courts of England, and it cannot be doubted that such was the rule in the authentication and probate of wills under the statute of frauds. By the statutes of 7 Will. IV., and 1 Vict., c. 26, however, all previous provisions as to execution and attestation of wills were repealed, and it was thereby enacted that no will should be valid unless in writing and executed as therein provided,and one of the requisites was that it should be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction. In Wills v. Lowe, 15 W. N. C. 428, and in Siner v. Bryer, 6 Moore's P. C. C. 404, however, it was held that the signature must be so affixed at the end of the will as to leave no blank space for any interpolation between the end of the will and the signature. This was found to produce such extensive injustice, that by the statute of 15 and 16 Vict., c. 24, the legislature interfered to alter the law so established, but in this amendatory statute it is expressly provided that no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor to any disposition or direction inserted after the signature shall be made. Upon these provisions of the statute law of England, the case of Allen v. Maddock, 11 Moore's P. C. C. 426, was decided. In that case, after an extended reference to all the English authorities and a full discussion of the subject, it was held that an unaltered paper, which would have been incorporated in an altered will or codicil, executed according to the statute of frauds, is now in the same manner incorporated, if the will or codicil is executed according to the requirements of the Wills Act, 1 Vict. c. 26; that where there is a reference, in a duly executed testamentary instrument, to another testamentary instrument, imperfectly executed, but by such terms as to make it capable of identification, it is necessarily a subject for the admission of parol evidence as to its identity, and such parol evidence is not excluded by the statute of 1 Vict., c. 26. The judgment in Allen v. Maddock was delivered by Lord Kingsdown, who says: "It was not contended in this case, nor so far as we are aware, has it been contended in any case, since the Wills Act of 1837 (1 Vict.), that no reference, however distinct, is now sufficient to incorporate another testamentary paper in the paper duly executed as a will or codicil; but the question has always been, what reference in the valid paper is sufficient to let in evidence to identify the invalid?" The doctrine declared in Allen v. Maddock, has not, we believe, in any respect been modified, changed or doubted. It is followed in many subsequent cases, and is frequently referred to as containing a clear and elaborate exposition of the law on the subject. *In re* Almosino, 29 L. J. (N. S.) 46; *In re* Ebenezer White, 30 L. I. 55; *In re* Birt, 24 L. T. R. 142.

In New York the revised statutes, *inter alia* required that every last will and testament, of real and personal property, should be subscribed by the testator at the end thereof. In Tonnele v. Hale, 4 Comstock, 140, a will was written on several annexed sheets of paper, and was duly executed; a copy of a map was upon the last of the sheets composing the instruments; it was referred to in the will as being annexed, and for the description and designation of the several lots devised, but was not signed by the testator nor attested by the witnesses. The Court of Appeals held that where a will, otherwise properly executed, refers to another paper already written, and so describes it as to leave no doubt of its identity, such paper makes part of the will, although it be not subscribed or even attached. It was contended in the argument of counsel in that case that such a sheet annexed must be considered as the beginning, or the end of the instrument, merely in reference to its local annexation, without regard to the contents of the writing, to which it is annexed; but Jewett, J., delivering the opinion of the court says: "I cannot agree that such a circumstance can have the effect to constitute the paper referred to, the beginning or end of any instrument, in the body of which reference is made

to it or its contents, whether annexed in fact or not. If the map on file in the register's office, or a reduced copy of it annexed, may be treated as a part of the instrument, and I think it may (Habergham v. Vincent, 2 Ves. Jr. 228; Bard v. Seawell, 3 Burr, 1775; Wilkinson v. Adams, 1 Vesey & Beames, 445), its contents must be incorporated and distributed in it to the extent of the several references made to it, at the places where made; and thus the contents of the paper, to which the instrument refers, will be deemed constructively inserted, before the point is reached, where the subscription by the decedent and signing by witnesses are made." We may also refer to similar rulings upon the same point in Loring v. Sumner, 23 Pick. 98; Wilbur v. Smith, 5 Allen, 194; Johnson v. Clarkson, 3 Rich. Eq. (S. C.) 305; Chambers v. McDaniel, 6 Iredell (N. C.), 226; Phelps v. Robbins, 40 Conn. 250; Crosby v. Mason, 32 Id. 482.

Mr. Redfield in his treatise on the Law of Wills, page 264, after a discussion of the authorities, English and American, says: "The cases already referred to shows very clearly that a will required to be witnessed by two or more persons, or executed with any other prescribed formalities, may, nevertheless, adopt an existing paper by reference. And this is true of others soon to be referred to, many of which were decided during the existence of statutes requiring such formalities, so that we cannot escape from the force of these cases by supposing they had reference exclusively to wills of personal estate, where no particular formalities were required under the earlier English statutes."

In our own State we find no case at variance with the doctrine of the cases stated; the rulings of this court, on questions similar in effect and preliminary in their nature, to that under consideration, have, in every instance, been in conformity with the views here expressed. In Ginder v. Farnham, 10 Barr, 98, it was held that where a will is written on several sheets of paper, fastened together with a string, proof by two witnesses of the signature of the testator, at the end thereof, is sufficient; that it is the signature, not the *factum* or body of the will, which is to be established by the witnesses, and whether there has been any subsequent or fraudulent interpolation is for the jury, to be determined as other cases. In Wikoff's Appeal, 3 Harris, 281, following the Earl of Essex's Case, 1 Show. 69, it was held that a will may be made on distinct pieces of paper; that it is sufficient if they are connected by their internal sense, and that even if there be some confusion in the order of their arrangement, when fastened together, they are to be read according to their coherence or adaptation of parts. In Fossleman v. Elder, 2 Out. 159, it was held, that where the name and designation of the beneficial party was written, not in the body of the codicil, but upon the face of an envelope, in which it was found, that the inscription on the envelope should be read as a preface to, and in connection with, the paper enclosed therein, and that they together constituted a valid testamentary disposition. There the general principle has been clearly established, that a will is to be read in such order of pages or paragraphs as the testator manifestly intended, and the coherence and adaptation of the parts clearly require. In writing a will upon the pages of foolscap paper, a testator may or may not conform to the order of the consecutive pages of the folio; there is no law which binds him in this respect; he may begin upon the fourth page of the folio and conclude upon the first, or he may commence upon the first, continue upon the third, and conclude upon the second; in whatever order of pages it may be written, however, it is to be read, as in Wycoff's Appeal, according to their internal sense, their coherence or adaptation of parts. The order of connection, however, must manifestly appear upon the face of the will; it cannot be established by extrinsic proof. Whilst, therefore, the end of the writing in point of space may in most cases be taken as the end of the disposition, it does not follow that in all cases the signature must of necessity be there written, if it be written at the end of the will, according to such connection and arrangement of pages or sheets as the obviously inherent sense of the instrument requires.

Where, however, the continuity of a writing, otherwise complete, is attempted to be broken by the insertion into it of a clause or paragraph written upon the same or a different page or sheet, the clause to be inserted must be plainly referred to, and be susceptible also of certain identification. The reference must, as we have clearly shown, be complete in the body of the will. The testator's intention cannot otherwise appear, it cannot appear by extrinsic proof; but the identification of that which is sought to be inserted in the nature of the case may be the subject of extraneous proof.

A plain distinction is to be drawn between the case at bar and that of Hays v. Harden, 6 Barr, 409. In that case there was no reference whatever, in the paper purporting to be the will of John Hays, to the clause which followed; there was no word or mark in the body of the will indicating any intention of the testator at the time of execution that the appended, unaltered clause should be drawn to and inserted at any designated place.

Referring then to the will of George Baker, we see that the several items contained in it are, in their order, from the beginning to the end of the disposition, consecutively numbered in Roman numerals; at the fourth item, we find the following:

"4. I give and bequeath to David S. Baker, our son, two hundred (see next page)."

The erasures in this fourth item are presumed to have been made before the signing and attestation, but they have some significance, in this in-

quiry, inasmuch as the subject of the devise to David S. Baker is the only matter erased. The numeral "4," and the name of David S. Baker, the beneficial party under it, remain, a fact which is entirely consistent with the idea that the error to be corrected by the erasure was as to the thing devised. The words which are not erased contain a clear reference to something to be found on the next page; something which is to constitute part of his will; otherwise the reference in that connection is without meaning, and something is to be inserted at the place of the reference. This is as apparent as if it had been fully expressed in as many words.

In the Goods of Birt, 24 L. T. R. 141, the will of Charles James Birt, after a devise to the testator's wife for life, contained the following: "With the full understanding that the four freehold cottages, situate at Finchley, in the county of Middlesex, and called by name and known as numbers 1, 2, 3 and 4, Arlington cottages* (see over, C. B.,)."

Upon the back of the will there was written "* that the said four cottages, at her decease, should be given and shall then belong to my daughters Ellenor and Elizabeth, now the wife of Mr. Cuthbertson, and the said four houses to be her own property, and under her own sole control. CHARLES BIRT.

It was shown by parol, that the words on the back of the will were written there by the testator before he signed the will. They were not attested, however by the witnesses as the English statute required; indeed, the witnesses knew nothing of it. Lord Penzance, in admitting this will to probate, says: "I have no hesitation in saying, that the words written at the back of this will ought to be included in the probate; the reason and good sense of the thing are in the same direction. The clause in the will has no meaning without these words—it is a sentence without any sense, begun but never finished. The testator at the end of this unfinished part of the will put a mark, and at the back of the will puts a corresponding mark, before certain words which finish the sentence. It is obvious, therefore, that if all this was done before the will was executed, the testator intended that which was physically on the opposite side of the page to be read in as if it preceded his signatnre. It is therefore intended to be part of the will. It will be better, therefore, in construing the words of the statute, to treat these words as if they preceded the signature, although they seem to follow it."

So in this case, without the insertion of something the fourth item is without meaning; it is, in the language of Lord Penzance, "a sentence without any sense, begun but never finished." It purports, in the outset, as the fourth item of the will, to contain a devise or bequest to David S. Baker, but by the erasure it is broken off abruptly before the disposition is completed. It is apparent that in the body of the will there was not room for completion, and therefore reference is made to the next page. This reference is clear in its purpose and specific in its terms; neither can be mistaken. If the words, "For the fourth item of this will containing a devise to David S. Baker, see next page," had been employed, they would not convey a more specific meaning than is conveyed by the words and figures actually employed. That the testator's intention was to incorporate into his will, by insertion at the place indicated, something to be found on the next page, is perfectly apparent and obvious; no one in reading the instrument could doubt the testator's purpose in this respect.

The physical annexation of the pages, taken with the uncontradicted proof, affords the clearest and most satisfactory evidence of identification. The "next page" of the folio cannot be mistaken, and referring to it, we find a clause thereon written in the same hand, in the form following:

"4th. I give and bequeath to our son, David S. Baker, our son, two thousand to be paid in rotation of numbers. I give and bequeath to our grandchildren, Margaret Baker and George Baker, daughter and son of David S. Baker, five hundred dollars each, to be paid in rotation, in rotation, to Lewis J. Baker, whom I appoint guardian for the same. Also I appoint the same as guardian for G. M. Baker's two girls, Viola and Ella."

It is true that this writing contains more than a devise to David S. Baker; but this, we think, is not important as its identification as an entirety is put beyond question. We are of opinion, therefore, that by force of the reference in the body of the will of George Baker and the clear identification of the matter referred to, the writing on the fourth page is *ipso facto* drawn into the body of the will, and constitutes the fourth item or clause thereof; and although the instrument thus formed is not signed by the testator at the end thereof, in point of space, it is signed at the end of the will, in point of fact, which is in conformity with the requirement of the Act of 1833.

The decree of the Orphans' Court is, therefore reversed, and it is ordered that the decree of the register be reinstated.

Mercur, C. J., dissented.

NOTE.—The principal case contains a very thorough and exhaustive discussion of the authorities, and a very clear statement of the principles established, upon the question involved.

The question is largely affected by the statutes, which differ somewhat. The English statute requires the name of the testator to be signed at the foot or end of the instrument. 1 Vict., Ch. 26; 1 Redfield on Wills p. 211, see Waller v. Waller, 1 Gratt. (Va.) 454. The Iowa statute provides that the will "must be in writing, witnessed by two competent witnesses and signed by the testator, or by some person in his presence and by his express direction." Miller's Annotated Code (Ia.), p. 608, § 2326. The requirement of these

Illinois statute are substantially the same. 2 Starr and Curtiss Anno. Stat., p. 2466. par. 2, and in Missouri, which is that the "will shall be in writing, signed by the testator, or by some person by his direction and in his presence," 1 R. S. Mo., 1879, p. 680, § 3962. Under this clause it has been held that the instrument as written shall be subscribed by affixing the name of the testator in the usual way of "executing other instruments of writing." Here the will was not written by the testator, and not signed at the conclusion or "foot thereof," though his name appeared in the body of the will, and, it also appeared, that a further signing was contemplated; this was held not to be a sufficient signing, Catlett v. Catlett 55 Mo. 330. The court said (p. 340): "It has been held in the cases on the subject, with a very few exceptions, that in order to the validity of the will where it is not subscribed at the conclusion or foot of the instrument, but only appears at the commencement or body of the instrument, the will must be in order to its validity, have been in the hand writing of the testator, and he must have intended the signature, wherever inserted, to be the authentication of the instrument and have contemplated no further signing."

In Jarman on Wills, it is said: "It was immaterial, under the statute of frauds, in what part of the will the testator's name was written, and where the whole will was in the testator's hand-writing, the name occurring in the body of the will, as the usual exordium, 'I., A.B., do make,' etc., was decided to be a sufficient signing. But the signature whatever its local position must have been made with the design of authenticating the instrument, for it would seem that if the testator contemplated a further signature which he never made, the will must be considered as unsigned."

Where the statute of frauds merely requires that the will should be signed by the devisor, it has been frequently held that it is not important in what part of the instrument the name appears. Lemayne v. Stanley, 3 Lev. 1; s. c. 1 Freem. 538; Adams v. Field, 21 Vt. 256, per Bennett, J.; s. c. Redfield's Am. Cases on Wills, 613.

But in such cases it is important that the name of the testator, in whatever part of the instrument it appears, should either have been written or adopted, by him, *as the final act of execution*. Griffin v. Griffin, 4 Ves. 197; Right v. Price, Doug. 241; Walker v. Walker, 1 Mer. 503; Coles v. Trecothick, 9 Ves. 249; Martin v. Waltin, 1 Lee, 130. Thus, in Sarah Miles' Will, 4 Dana 1; s. c. Redfield's Am. Cases on Wills, 624, under the Kentucky statute of Wills, it was held to be a sufficient execution that the name of the testatrix appeared in the body of the will, although the will was written by another, at her request, and read over to her and approved by her, in the presence of the witnesses; she failing to sign it for want of strength. This case contains a full consideration of the question. See Dewey v. Dewey, 1 Met. (Mass.) 349: s. c. Redf. Am. Cases on Wills, 619 and note.

In Armstrong v. Armstrong, 29 Ala. 538, the name of the testator was written in the beginning of the will by another, but in his presence and by his direction, and acknowledged to the attesting witnesses at the time of its execution. This was held to be as valid as if written by the testator. In Waller v. Waller, 1 Gratton (Va.) 454, the will was not signed at the end, but it was written by the testator, and his name appeared at the beginning. Under the Virginia statute, the signing, to be sufficient, must be as upon its face, and from the frame of the instrument, it appears to have been intended to give it authenticity—it must appear that the name written was regarded as a final signature, and that the instrument was complete without further signing; and the paper itself must show this.

Papers or instruments properly referred to and identified may become part of the will, although not attached.

In Fickle v. Snepp, 97 Ind. 289; s. c., 49 Am. Rep. 449, it is held that notes made by a testator, payable at his death, folded up with his will, referred to and clearly identified therein and remaining in his possession at his death, are a part of the will. The court said (p. 451): "The notes which the testator signed at the time he executed the will are clearly and fully identified. There cannot be the slightest doubt as to their identity. They are therefore to be regarded as part of the will," see Fesler v. Simpson, 58 Ind. 83; Fosselman v. Elder, 98 Pa. St. 159.

In Newton v. Seaman's Friend Society, 130 Mass. 91; s. c., 39 Am. Rep. 433; s. c., 2 Am. Prob. Cases, 18, (with exhaustive note), Gray, C. J., said: If a will executed and witnessed as required by statute, incorporates in itself, by reference, any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof, as the paper referred to therein, takes effect as part of the will and should be admitted to probate as such"—see Church v. Brown, 21 N. Y. 315, 330; Tudlun v. Otis, 15 Hun, (N. Y.) 410; Wert v. Benedict, 1 Bradf. Sur. R. (N. Y.) 114, 119; Thompson v. Quinby, 2 Bradf. Sur. R. 449; In Goods of Tovey, 47 L. J. (N. S.) P. & D. 63; In Goods of Luke, 11 Jur. (N. S.) 397; In Goods of Brewis, 3 S. & T. 473; In Goods of Sutherland, L. R. 1 P. & D. 198; In Goods of Yockey, 29 L. T. (N. S.) 699; In Goods of Sims, 16 W. R. 407; Langdon v. Astor's Exec. 16 N. Y. 9; Johnson v. Clarkson, 3 Rich. Eq. (S. C.) 305.

In the recent case of Gerrish v. Gerrish, 8 Oregon, 351; s. c., 34 Am. Rep. 585, it is held that where the will of a testatrix, otherwise properly executed, refers to will of her late husband, and so describes it as to leave no doubts of its identity, and adopts the provisions therein contained, it becomes a part of such will, and should be considered in construing its provisions.

In Tounele v. Hall, 4 Com. 140, the will referred to another paper already written and so described it as to leave no doubt of its identity. The paper was held to be a part of the will, although it was not subscribed or even attached.

EUGENE MCQUILLIN.

St. Louis, Mo.

WEEKLY DIGEST OF RECENT CASES.

1. MUNICIPAL CORPORATION. [*Bonds of.*]—*Sale of, by a Syndicate, when Unauthorized and Void.*—A statute of Pennsylvania authorized the councils of any city of the second class to make, execute and negotiate bonds to be used in paying and retiring other bonds previously issued by the city. The bonds were to be sold at not less than par value, with accrued interest, but said councils could allow a reasonable compensation for sale or negotiation. A syndicate or firm finally entered into an

agreement under which it was declared that the bonds were sold by the city to the syndicate, and which provided that a commission should be allowed upon all bonds purchased or exchanged by them. It is *held* such contract is not authorized by the act of legislature, and is therefore void. *Whelen's Appeal*, S. C. Pa., Oct. 5, 1885; 1 Atl. Repr. 88.

2. ——. ——. [*Street Improvements.*]—*Liability to Property-Owners for Damages to Property Incurred in Making Street Improvements.*—1. If the owner of a lot near a town builds a dwelling-house on his lot and improves it otherwise, and afterwards the limits of the town are extended, and the town opens a new street or extends the old one, which does not pass through this lot but passes along one of the boundaries of the lot, and in grading and improving the street the town damages permanently this lot and dwelling without acquiring a right to do so from the owner, and on demand paying him a just compensation therefor, the owner of the lot by virtue of § 9 of our bill of rights has a right to recover of the town in an action on the case the damages, which he has thus sustained. 2. If the owner of such lot outside of the limits of a town builds a residence upon it and otherwise improves it, and the lot fronts on the Northwestern turnpike, and subsequently the limits of the town are extended so as to include this lot, and the State cedes to the town all its interest in the Northwestern turnpike within the enlarged limits of the town, and the town subsequently improves the Northwestern turnpike making a street of it in front of this lot, and in so doing injures it permanently without acquiring a right to do so from its owner and without paying him on demand a just compensation for this injury, the owner of the lot by virtue of the 9th section of our bill of rights has a right to recover of the town in an action on the case the damages he has thus sustained, whether in improving the street in front of the lot the town has done this injury by simply filling up the whole width of the turnpike to the height of the eighteen feet of graded road, which the Northwestern pike under its charter had originally graded and made a road, or whether it increased or decreased the height of the grade of the original road-bed of the Northwestern turnpike. *Hutchinson v. City of Parkersburg*, S. C. W. Va., Nov. 29, 1884; 25 W. Va., 226 (adv. sheets).

3. ——. ——. *When Equitable Owner may Recover Full Compensation.*—W. H. is the equitable owner of such a lot, and the legal title to only a moiety of it is in him, but the mere legal title to the other moiety is in his wife subject to his life-estate therein, and H. brings alone such action on the case against such town not joining his wife as co-plaintiff in such action, and the town pleads to the declaration not guilty, the plaintiff is entitled to recover the whole amount of the damage, which has been thus done by the town to his lot and dwelling. *Ibid.*

4. ——. ——. [*Negotiable Paper.*]—*Power of School Commissioners to Issue Promissory Notes.*—Under a statute which confers upon a board of school commissioners the power to purchase ground, erect school buildings, purchase supplies, employ and pay teachers, appoint superintendents, and disburse through the treasurer of the board of school commissioners, moneys for all school and library expenses, it is held that such a board might contract for the erection and completion of a school house, might agree to pay the contractor therefor partly in cash and partly on time, and for the deferred payments might lawfully make and deliver to him promissory notes, which would be valid obligations and binding upon the school corporation. [The court cite: Sheffield School Tp. v. Andress, 56 Ind. 157; School Town of Monticello v. Kendall, 72 Ind. 91; Wallis v. Johnson School Tp., 75 Ind. 368; Johnson School Tp. v. Citizens Bank, etc., 81 Ind. 515.] *Falout v. Board of School Commissioners*, S. C. Ind., May 26, 1885; 1 N. E. Repr. 389.

10. ——. ——. [*Powers of.*]—*Employing Counsel to Procure the Passage of a Legislative Act.*—A municipal corporation cannot compensate out of the public funds persons employed to procure the passage by the legislature of an unconstitutional act. [Citing Minot v. W. Roxbury, 112 Mass. 1; Coolidge v. Brookline, 114 Mass. 592.] *Mead v. Inhabitants of Acton*, S. C. Mass., 1885; 1 N. E. Repr. 413.

6. PENSIONS. [*Exemptions.*] *Extent of Exemption of Pension Money from Legal Process under Rev. St. U. S.* § 4747.—By § 4747 of the Revised Statutes of the United States it is provided: "No sum of money, due or to become due to any pensioner, shall be liable to attachment, levy or seizure, by or under any legal or equitable process whatever, whether the same remains with the pension office or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall enure wholly to the benefit of such pensioner." It is held that, by the force of this statute, the money due a pensioner is exempted from attachment or seizure upon legal process while it remains with the pension office or any officer or agent thereof, or is in course of transmission from such officer or agent to the pensioner, but not after the money has come to the pensioner's hands; when the money is actually in the possession of the pensioner the protection ceases. [In the opinion of the court by Peters, C. J., it is said: "Certainly, the money could not be protected in its transitions from property to property. The moment its identification is gone, the protection confessedly ceases. If the money goes into attachable real estate such estate may may be taken for the pensioner's debt See Knapp v. Beattie, 70 Maine, 410. There would surely be some ground for saying that there might be an unfairness in extending the protection to the limit contended for. If the money be exempted against any debts, it would be against all attachments and all debts. And the pensioner may have obtained credit from the very fact of the possession of property acquired in this way. There are decisions favoring our view of the question. The Iowa court has twice affirmed the same view. Triplett v. Graham, 58 Iowa, 136. In Webb v. Holt, 57 Iowa, 712, it was said that 'the exemption applies only to money due the pensioner, while in course of transmission to him, and that there is no exemption after it comes into his possession.' In Jardain v. Fairton Saving Fund Ass'n, 44 N. J. (Law) 376, the same conclusion was reached, where it is said by the court: 'The fund is not placed in the hands of a pensioner as a trust, but it is to enure wholly to its benefit. When it comes to him in hand or personal control, it is his money as effectually and for all purposes as the proceeds of his work or labor would be, and whether he expends it in new contracts, or it be taken to pay the consideration due from him for

those of the past, it equally enures to his benefit.' In 126 Mass. 113 (Spelman v. Aldrich), it was held that 'even if, by the laws of the United States, the pension was exempt from attachment while it remained in the form of a pension check, the exemption ceased after the money was drawn upon the check. Cranz v. White, 27 Kan. 319, is to the same effect. See s. c., 41 Amer. Rep. 408 and note. In 50 Vt. 612, Hayward v. Clark, a case not directly calling for a decision of the question, a different view is intimated." *Friend v. Garcelon*, S. C. Maine, Jan. 5, 1885; 77 Me. 25 (adv. sheets); *Crane v. Linnœus*, S. C. Maine, Jan. 15, 1885; 77 Me. 60 (adv. sheets).

7. PLEADING. [*Indiana Code.*] *Objection to a Bad Pleading must be seasonably made.*—The ruling principle of the Indiana Code is, that parties must, with the single exception of an attack upon the complaint, raise their questions in the trial court and preserve timely exceptions. The sufficiency of an answer may be tested in the trial court by demurrer and by motion for judgment on the pleadings. The latter is, in effect, a motion for a judgment notwithstanding the verdict, and if the answer is bad this motion, followed by a proper exception, will save the question on appeal. Notwithstanding a verdict may have been found for the defendant on the issue joined on a bad answer, the plaintiff would be entitled to a judgment on the pleadings, because his complaint would have stood confessed, and with no valid matter set up in bar of it. But where neither demurrer nor motion is interposed, the answer cannot be attacked on appeal. [The objection to the sufficiency of the answer as a defence was made for the first time in the Supreme Court. In giving the opinion of the court, Elliott, J., said: "The current of our decisions has been steadily in favor of the rule, that if a pleading is not challenged in some appropriate method in the trial court it cannot be successfully assailed on appeal. This general rule was applied to complaints and prevailed until changed by an express and positive statute. Johnson v. Stebbins, 5 Ind., 364; Menifee v. Clark, 35 Ind., 304; Newhouse v. Miller, 35 Ind., 463; Hannum v. State, 38 Ind., 32. The rule has been almost, if not quite, uniformly applied to answers, for the reason that there is no statute permitting such pleadings to be primarily and directly attacked in the assignment of errors. Roback v. Powell, 36 Ind., 515; Snyder v. Snyder, 50 Ind., 492; Campbell v. Coon, 61 Ind., 516; Crowder v. Reed, 80 Ind., 1, *vide* p. 6; Shordan v. Kyler, 87 Ind., 38. It is contended by the appellant's counsel that these decisions were made upon a former code, and are not applicable to the present code. The only difference in the two codes is that the present omits from § 346 the words "Unless the objection be taken by demurrer it shall be deemed waived," which were embodied in § 64 of our former code. We cannot concur with counsel in this view. The omission of these words worked no radical change, for, without them, the failure to test the answer in the trial court, in some appropriate method, precluded plaintiff from making the question of the insufficiency of the answer on appeal for the first time. The spirit of the code, rather than any mere form of words, supported the rule laid down by former decisions that the failure to attack the answer in the trial court precluded the appellant from assailing it for the first time in this court. In cases far too numerous for citation, extending from the earliest to the latest decisions upon the code practice, it has been held that exceptions to the ruling of the trial court must appear in the record or this court cannot review and reverse the judgment. Time and again has this doctrine been affirmed and in no uncertain terms. The ruling principle of the code is that parties must, except in the single exception of an attack upon the complaint, make their questions in the trial court, and reserve timely exceptions. In almost every conceivable shape the question of what rulings can be reviewed where no exception is reserved has been presented and it has been invariably ruled that where there is no exception there can be no review, save only in the solitary exception made by the statute. Of the great number of cases illustrating and enforcing our proposition we cite but a few. Cupp v. Campbell, Oct. 8, 85 [*post*]; Wales v. Miner, 89 Ind., 118 see p. 122; Martindale v. Price, 14 Ind., 115; Davis v. Engler, 18 Ind., 312; Sutherland v. Venard, 32 Ind., 483; Shirts v. Irons, 28 Ind., 459; Train Ex. v. Gridley, 36 Ind., 241; Trentman v. Eldrdge, 98 Ind., 525, p. 527; Buchanan v. Berkshire Ins. Co. 96 Ind., 510; Standley v. Northwestern Ins. Co., 95 Ind., 254; Scheitle v. Slagle, 89 Ind., 323; Fisher v. Purdue, 48 Ind., 323; Roush v. Emerick, 80 Ind., 551; Houser v. Roth, 39 Ind., 89." *Evansville v. Martin*, S. C. Ind., 1885; Western Repr. 193.

8. POST MASTER. [*Implied Assumpsit.*] *When Post Master cannot Recover of Railway Company for Handling Mails as upon an Implied Assumpsit.*—The postal regulations, made, published and distributed by the post-office department for the instruction of all contractors, employees, and postmasters are, as to all such persons, matter of law and not of fact, and therefore a mistake by a postmaster as to his duty in receiving and delivering mail from the railway postal clerks at the cars, when the railway company should deliver it, will not be such a mistake of fact as to allow him to recover from the company pay for his services on an implied contract therefor. *East Tenn. etc. R. Co. v. White*, S. C. Tenn., Oct. 31, 1885; opinion by W. P. Washbun, Sp. J.

9. ——. ——. ——. A person who is employed by a railroad company as station agent at a regular salary, and is also express agent, and as agent of the company, bound to attend it every mail train, and is moreover, postmaster and occupies, by permission of the company, a room in the depot, free of rent, for a post-office, is not entitled, as on an implied contract, to receive from the company whose duty it was to deliver the mail at the post-office compensation for rendering such service himself, in the absence of express notice to the company that he will expect and demand such compensation in addition to his regular salary. *East Tenn. etc. R. Co. v. McNight*, S. C. Tenn., Oct. 31, 1885; opinion by W. P. Washbun, Sp. J.

10. SPECIFIC PERFORMANCE. [*Evidence*]. *Quantum of Proof Required.*—The certainty of proof in a suit for specific performance is greater than in an action for damages. [Wallbridge, C. J., delivered the judgment of the court (*a*). After an examination of the evidence he proceeded,—The answer by defendant Calloway asks for specific performance of this agreement. The certainty required in proceedings for specific performance is greater than in an action for damages. Marsh v. Milligan, 3 Jur. N. S. 979. Brealey v. Collins, Younge, 327, cited in Gough v. Bench, 6 Ont. R. 707, with approval. Specific performance is an appeal to the discretion of the court, and uncer-

tainty itself is a good answer for relief. Higginson v. Clowes, 15 Ves. 516; 1 Ves. & Bea. 524, and when there are two differing contracts the court refuses specific performance to both. Callaghan v. Callaghan, 8 C. & F. 374; Howe v. Hall, Ir. R. 4 Eq. 252.] *Tait v. Calloway*, S. C. of Manitoba, 1885; 2 Man. Law Rep. 289.

11. STATUTE OF FRAUDS. [*Interest in Land.*]—*Contracts for the Sale of Standing Timber not Within the Statute.*—Parol or simple contracts for the sale of growing timber to be cut and severed from the land by the vendee do not convey any interest in lands, and are not therefore within the statute of frauds. [In giving the opinion of the court, Foster, J., said: "And the rule, as settled by modern decisions in reference to this question, is this—that parol or simple contracts for the sale of growing timber, to be cut and severed from the freehold by the vendee, with reference to the statute of frauds, and to give effect to them, have been construed as not intended by the parties to convey any interest in land, and, therefore, not within the statute of frauds. They are held to be executory contracts for the sale of chattels, as they may be afterwards severed from the real estate, with a - cense to enter on the land for the purpose of removal. White v. Foster, 102 Mass. 378; Claflin v. Carpenter, 4 Met. 583; Poor v. Oakman, 104 Mass. 316; Parsons v. Smith, 5 Allen, 578; Erskine v. Plummer, 7 Maine, 451; Davis v. Emery, 61 Maine, 141; Freeman v. Underwood, 66 Maine, 233; 1 Wash. R. P. 3d § 7; Benj. on Sales, § 126, note, and cases there cited; Marshall v. Greene, 1 L. R. C. P. Div. 44; Nettleton v. Sikes, 8 Met. 35; Ellis v. Clark, 110 Mass. 391."] *Banton v. Shorey*, S. C. Me., Jan. 10, 1885; 77 Me. 48 (adv. sheets).

12. STATUTE OF FRAUDS. [*Promise to Pay Debt of Another.*]—*Parol Undertaking to Indemnify Constable for Levy.*—The defendants were sureties on an undertaking on an appeal from a justice's court. After such appeal had been dismissed, they requested the plaintiff, a constable, to levy execution upon certain personal property, which they stated belonged to the judgment debtor. The plaintiff asked from the defendants a bond of indemnity to secure him against any damages he might sustain by reason of the levy and sale, should they prove to be wrongful. The defendants verbally promised to indemnify him, whereupon the plaintiff levied upon and sold the property under the execution, and thereby paid and satisfied the judgment in full. Such property did not belong to the judgment debtor, and the plaintiff, in an action against him by the owner, was compelled to pay for the conversion thereof. The plaintiff thereupon sued the defendants upon their verbal promise of indemnity. *Held*, that such action could be maintained; that if the execution was issued at the request of the defendants, without the knowledge of the judgment creditor, he ratified and confirmed their act in ordering it, when he accepted the money under it in full payment and satisfaction of his judgment; that the interest the defendants had in having the execution satisfied out of the property of the judgment debtor, was a sufficient consideration for their promise of indemnity, and that such promise was not within the statute of frauds. *Lerch v. Galup*, S. C. Cal., Oct. 22, 1885; 7 W. C. Repr. 745.

13. TRIALS. [*Instructions.*] — *Error to Authorize Jury to Find on their Personal Knowledge.*—An instruction which authorizes a jury, in determining an issue presented to them, to infer what was the fact from the evidence, "or from such personal knowledge as you may have in relation to matters of this kind," is erroneous. [In giving the opinion of the court, Libby, J., said: "This instruction authorized the jury to find the nature, cause, and time of development of a curb from such personal knowledge as they might have in relation to matters of that kind. We think this was error. The judge may have intended to tell the jury that, in considering the evidence, they might bring to its consideration, in determining the weight to be given to it, such general practical knowledge as they might have upon the subject, which would not transgress the rule of law applicable to the case, but he failed to do so. The subject under consideration was not one of general knowledge and observation, but one of science, upon which no witness, not specially qualified as an expert, could testify. It does not appear that any juror upon the panel was qualified as an expert to testify or give his opinion upon the subject under consideration; and still each juror may have thought he was, and under the instruction given, may have based his conclusion solely upon what he thought his personal knowledge was, disregarding the evidence submitted by the parties. The verdict thus given would not be 'according to the evidence given them, but according to their own personal knowledge of the subject-matter. under consideration. We think the case is clearly within the authority of State v. Bartlett, 47 Maine, 388, and Schmidt v. N. Y. U. M. F. Ins. Co., 1 Gray, 529."] *Douglass v. Trask*, S. C. Maine, Jan. 6, 1885; 77 Me. 35 (adv. sheets.)

QUERIES AND ANSWERS.

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES ANSWERED.

Query 32. [21 Cent. L. J. 417. T., aged nineteen, was married by a justice while under arrest for seduction and bastardy, to one aged seventeen, and has never lived with his alleged wife nor recognized the marriage. The statute permits marriages of males at eighteen and females at sixteen. Defendant files a bill to set aside marriage for duress, minority, want of ratification, etc. Meanwhile wife applies for arrest of T. for failure to support, etc., and defense claims he owns nothing, never intended the marriage to any more than clear him of arrest, and his father owns his time. Is marriage valid? Or can he be held to support her?

Answer. 1. "If a man, arrested under bastardy process as the putative father of a child of which the woman procuring the arrest is pregnant, marries her, even though, being unable to procure bail, he does it purely to avoid being imprisoned and compelled to contest the charges she has made oath to; he cannot afterward, on learning he could have made a successful defense, have the marriage set aside as procured by duress." *Aliter*, perhaps, if arrested under a void process. 1 Bish. M. & D. (4th ed.) § 212. 2. If the separation was by mutual consent, still the husband must support his wife the same as when they are living in cohabitation. 1 Bish. M. & D., § 578. So if the separation was by his fault. Id., § 568. But not

if by her fault. Id., § 573. See Manby v. Scott, 2 Smith's L. C., 419. 3. "Necessaries for an infant's wife are necessaries for him." Comyn's Dig. Tit. Enfant (5); Schouler's Dom. Rel. 87, 558. And he is liable therefor the same as if he were of full age. 1 Bish. M. & D., § 553. 4. It is said that where an infant lives with or under the control of his parents or guardian, no credit is ever implied as given to him, but it must be proved to have been given to him. 1 Minor's Inst., 524. But it is evident from the nature of the contract of marriage that the above rule does not apply to this case. The legal status of marriage being proved, the law imposes the duty upon the husband to support the wife. 1 Bish. M. & D., § 557. 5. The marriage of an infant, with his parent's consent, emancipates him (so far as his wages are concerned) from parental control. So Mr. Schouler thinks it would if the infant marries without their consent. Schouler's Dom. Rel. 370. But it is held otherwise in Maine. White v. Henry, 24 Me. 531. See Burr v. Wilson, 18 Tex. 367; 1 Minor's Inst., 438. T. D. C.

Arkadelphia, Ark.

Query 39. [21 Cent. L. J. 444.] A. makes a note to B., reading, "On or before January 1st, A. D., 1886, I promise to pay," etc., note bearing ten per cent. interest. Can A. tender to B. the principal and amount of interest up to date of tender before maturity of said note and be discharged?

Answer. The principal sum may be paid either at the time specified or at any earlier time that the maker may elect, and the interest is to be computed only until the note is paid. Stults v. Silva, 119 Mass. 137. But a note containing a provision that it shall be payable "in one and one half years or sooner," was held not negotiable, as the time for payment was uncertain, depending on the election of the maker. Stults v. Silva, 119 Mass. 137, opinion by Gray, C. J. In Mattison v. Marks, 31 Mich. 421, C. J. Cooley held that a note payable on or before a certain day might be paid before that day, and also that such a note was negotiable. Also in Jordan v. Tate, 19 Ohio St. 586, the court held the negotiable character of a promissory note is not affected by the fact that it is made payable on or before a future day therein named. Though the maker has a right to pay such note at any time after its date, yet for all purposes of negotiation it is to be regarded as a note payable solely on the day therein named.

S. G. M.

Cincinnati, Ohio.

RECENT PUBLICATIONS.

CRIMINAL DEFENCES, VOL. 3. [DISABILITY—NON-LIABILITY.]—Adjudges cases on Defences to Crime, vol. 3. Including disabilities of parties (as corporations, coverture and infancy); criminal irresponsibility of principal and agent; non-liability for accidents, ignorance and mistake of law and fact; duress; consent as an answer to a criminal charge; and non-liability for acts of omission and for attempts. With notes by John D. Lawson. San Francisco: Sumner Whitney & Co., 1885.

We must remind the reader that the plan of this work is not to give all the cases upon a particular topic in the law of crimes, nor the leading cases, nor even the best cases, but those cases only in which a particular defence has been adjudged sufficient and has been successful. We do not approve of the plan of the work. We think that it will be open to mistrust, growing out of the fact that it gives only those cases which, having regard to their results, rest upon one side of the discussion, and that it does not present as a whole a correct view of the body of the adjudged law upon any subject. Such being its scope, it will fail of its purpose even as a tool or machine to enable advocates of a certain class to defend crimes; because they will constantly find themselves falling into a trap in relying upon a series of cases which array themselves only upon one side of the question. When the strong cases from the unknown mass upon the other side are brought to bear against them, they may find that a book constructed on this one-sided plan does not always defend. Indeed, it looks like a mere effort to make money without any regard to its effect upon the administration of justice.

BRADWELL'S REPORTS, VOL. 16.—Reports of Decisions in the Appellate Courts of the State of Illinois. By James B. Bradwell. Vol. 16. Containing all the remaining opinions of the First, Second and Fourth District up to the 1st of September, 1885, and all the remaining opinions of the third District up to and including a portion of those filed August 20th, 1885. Chicago Legal News Co., 1885.

These decisions are not elsewhere reported. The appellate courts of Illinois occupy a position between the circuit courts and the Supreme Court. They were organized to relieve the Supreme Court of its burden of work, and they proceed by substantially the same methods as that court. The bench in each appellate district is, we understand, selected by the judges of the Supreme Court, by appointing certain of the circuit court judges to do appellate duty. We understand that the system works well. These decisions cover a variety of subjects and, for the most part, bear intrinsic evidence of being carefully considered. Judge Bradwell is an experienced reporter and does his work well. These reports are not "annotated" according to the craze that has taken hold of the publishers of the so-called "reporters," except by a skillful condensation of the briefs of counsel; and this is, on the whole, the best and most acceptable annotation.

THE FEDERAL REPORTER, VOLUME 23.—Cases argued and determined in the Circuit and District Courts of the United States, March—June, 1885. Robert Desty, Editor. St. Paul: West Publishing Co., 1885.

It is well known that this is the only series of reports extant which undertakes to give all the decisions of all the Circuit and District Courts of the United States upon all the subjects upon which those courts exercise their jurisdiction. Whether the enterprising publishers are able to give them all or not we have no means of knowing. They have large resources at their command, and no doubt they glean the field thoroughly. Many of the cases are annotated by competent writers.

JETSAM AND FLOTSAM.

A MOCKERY OF THE LAW.—A Richmond. Va,, press despatch dated Nov. 20 says: "L. B. Jones, a young and prominent man here, was to-day fined one cent and given one hour in jail by a jury in the Hustings Court for sending a challenge to fight a duel. The trouble out of which this hostile correspondence grew occurred between Jones and C. P. Bradley, another young man, in August last. No meeting took place between them, and the difficulty was amicably adjusted. The officers, however, arrested Jones, and he was tried to-day. It is the second time in the history of the dueling laws of Virginia since the war that any punishment has ever been inflicted for their violation."